18th CONGRESS, 1st SESSION.

A Remonstrance

TO THE

CONGRESS OF THE UNITED STATES,

ON THE SUBJECT OF THE

Decision of the Supreme Court of the United States,

ON THE

OCCUPYING CLAIMANT LAWS OF KENTUCKY.

FEBRUARY 9, 1824.

Committed to a committee of the whole House on the state of the Union.

WASHINGTON:

PRINTED BY GALES & SEATON.

1824.

REMONSTRANCE.

The Legislature of Kentucky feels itself constrained to remonstrate against the principle proclaimed by the Supreme Court of the United States, at the last term of the court, in the case of Green, &c. vs. Biddle. If it should be asked why the state of Kentucky interferes with the decision of that court, in a case in which she was not, and could not have been, a party, the answer is, because that court has, in that case, most afflictingly interfered with the great and essential rights of the state of Kentucky.

Kentucky was, as is known, before she became a state, a portion of Virginia, denominated the *district* of Kentucky. Preparatory to her erection into an independent state, she entered into a compact with Virginia. The compact bears date on the 18th day of December, 1789, and consists of eight articles. The third article, (which provides "that all private rights and interests of land within the said district, *derived* from the *laws* of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state,") has been interpreted by the court, in that decision, to be a covenant on the part of Kentucky, not to enact any laws in relation to such of the lands within her limits, as had been appropriated under the laws of Virginia. A copy of the decision accompanies this remonstrance. A copy of a petition under the signatures of John Rowan and Henry Clay, presented by those gentlemen on the part of this state for a rehearing, or rather for a reconsideration of the case, is also transmitted herewith. The petition was presented to the court at the term at which the decision was pronounced, and was, (it is hoped) hastily overruled. From the two documents above referred to, an ample view of the case, the facts which belong to it, and the law which ought to govern it, may be had.

The petition employs a series of appropriate reasoning, which induces the Legislature to adopt it as a part of this remonstrance. The Legislature forbears to express in this remonstrance the feelings of regret which the occasion of it inspires. The object of this effort is to avert the humiliation which that decision inflicts, not to anticipate it. While it is believed that the court, venerable and august as it is, labored under some unaccountable infatuation, impurity of motive is not imputed to it; yet the reference by the court to the *common law* of England as the law of Virginia, whence the rights to land in Kentucky were *derived*, and the inference of reasoning which they

employed, led them to a result which disrobes Kentucky of her sovereign power, and places her in a posture of degradation which she never would have consented, and never can consent, to occupy. That court has, in that decision, denied to the state of Kentucky the power of legislating, even *remedially*, in relation to the territory which she acknowledgedly possesses; territory over which neither the Congress nor any state in the Union can legislate; and subjected her to the code of laws, in relation both to right and remedy, which existed in Virginia at the date of the compact. The power of legislating is, unquestionably, the most prominent of the powers which constitute the sovereignty of the states. It is the power which involves the representative principle, more intimately and essentially, than any other power claimed or possessed by the states of the Union; and the representative principle is vitally connected with civil liberty, in any shape in which it can be supposed to exist. The legislative is the only power which distinguishes the sovereign from the vassal; a power without which no people can be free, even in contemplation. It is, in relation to civil society, what the exercise of volition is in relation to freedom of agency. The man whose will is not the rule of his action, is not a free agent; he is the slave of that person whose will controls him. When the control is absolute, he is an unqualified slave; when the control is limited, he is, correspondently vassal. Precisely so with civil societies: they are free in the degree only in which they are governed by their own will, or, in other words, by laws of their own enaction; and vassal, so far as they are governed by the will of others; and it must be matter of but little concern to them, whether the will imposed upon them as the rule of their property and their conduct, be displayed in enactments or in *edicts;* they are, in either case, alike deprived of self-government. And whether the governing power be exerted mediately and covertly, or immediately and openly, can make but little difference with a people accustomed to self-government, and possessing pride and intelligence enough to estimate and assert it. They will surrender it in neither case without the apology of relentless and invincible necessity.

The people of every society must, from the nature and obvious destiny of man, depend upon the *soil* of the country which they inhabit for sustenance, for convenience, and for social intercourse; they are, consequently, dependent upon the power that legislates over the soil; and if they do not possess the power of legislating over it, they are not, they cannot be said to be free; they must be dependent upon, and subject to the power that legislates over it. They cannot even condemn the land necessary for a road, or subject any portion of it to the erection of a mill, upon terms other than those which may be prescribed by an alien power.

The court, in the decision alluded to, have asserted that the district of Kentucky, in the compact which she formed with Virginia, in the view to become an independent state, renounced forever, by stipulation in the third article thereof, the right of self-government, and the independence at which she aimed; that is, they have so construed the

means which were employed to produce the *end*, as not only to defeat the end, but produce a result which neither of the parties contemplated, and both deprecated; a result infinitely less desirable to the people of Kentucky, than the posture from which it was their avowed object, in forming the compact, to escape. For, if the district, instead of being erected into the state of Kentucky, had remained a part of Virginia, she would have retained a voice, and her proportional weight in the formation of those laws by which she would be governed. She would, in that case, have been a portion of a great, free, and independent state; whereas, by the interpretation given to the third article of the compact, she is left but nominally a state, with less than provincial powers; for, if Kentucky were a province toVirginia or any other state, she might hope to obtain, by the fervor of her importunities, in the form of humble petition, from the mother state, some enaction suited to her condition, and calculated to protect honest labor from speculating rapacity. But the condition into which she has been construed by that decision, deprives her (if she cannot escape from it) of even that humiliating hope. Virginia cannot legislate for her; she cannot legislate for herself; nor can either, or any power on earth, enact or modify even a remedial law which relates to the soil, so as to suit the condition of Kentucky. The code of laws which existed in Virginia on the 18th of December, 1789, consisted of enactions made as the accruing circumstances, and the varied condition of the people of that state required, through a long tract of time, from the colonization of the province of Virginia up to that period. Virginia was an old state, advanced in commerce, refinement, and civilization; the district of Kentucky was comparatively a wilderness. The former bordered on the Atlantic, and enjoyed the intercommunion and society of states advanced like herself in commerce and the social polities. Kentucky was solitary and detached in her situation; she lay far west behind the Great Mountains, and had been the subject of legislation only so far as the lands which composed her territory could be made marketable by legislative cognizance. Her rising population had occupied the attention of the legislature of Virginia to a very limited extent. The remote situation of the district from the seat of the Virginia government; its need of laws suited to its condition; its destitution of them, and the impracticability of obtaining them suitably to her wants, as they were evolved by the peculiar circumstances and condition of the country, formed with the district a strong motive to become a state, and with Virginia to assent to it. The condition of Kentucky needed the exercise of the legislative power, within the latitudes which bounded her territory. She would not have needed the exercise of that power, if the code of Virginia had been adapted to her condition and circumstances; but that code had been suited to a different climate, and to a people of different habits, inclinations, and pursuits. Yet the court has fastened upon the people of Kentucky, the *very code* which, on account of its inaptitude to their condition, they had intended by the compact to avoid, and have by their construction of that compact, denied them

the *very faculty* with which it was the purpose of that instrument to invest them; the faculty of from time to time enacting laws for themselves, as their varied condition and their wants might indicate the necessity or expediency of doing so. In aspiring to the state posture, and in the formation of the compact as auxiliary to that object, Kentucky looked forward to that increased happiness and prosperity, which the people might expect from the exercise of the RIGHT of self-government. That right, subject only to the limitations imposed upon its exercise by the constitution of the United States, Kentucky never stipulated to relinquish; nor is it believed that a stipulation to that effect would have been valid. It is denied, that an express stipulation by a state, to renounce the power of legislating over its territory, would be obligatory and valid. It is believed that the general scope and spirit of the constitution of the United States, would restrain any state in the Union from such an act of disfranchisement. No state can, by compact or otherwise, become the province of another state; still less can any state, under the pretext of erecting a new one out of its territory, create a province in the form of a state, or stipulate that a state erected out of its territory, shall possess the form only, without the sovereign power of a state. And what the states could not do by express stipulation, the judiciary, it is contended, cannot do for them by construction. The construction of the court which thus disfranchises the state of Kentucky, can neither exact the homage of the people upon whom it acts, for the intellect employed in making it, nor conciliate their patience under its humiliating and afflicting effects. If the same privative effects were attempted to be produced upon the individual and political rights of the people of Kentucky, by a foreign armed force, and they were not to repel it at every hazard, they would be denounced as a degenerate race, unworthy of their patriotic sires, who assisted in achieving the American Independence; as a people unworthy of enjoying the freedom they possessed. In that case the United States too would be bound, at whatever hazard, to vindicate the right of the people of Kentucky to legislate over the territory of their state; to guaranty to them a republican *form of government*, which includes the right insisted on. And can it make any difference with the people of Kentucky, whether they are deprived of the right of regulating by law, the territory which they inhabit, and the soil which they cultivate, by the Duke de Angouleme at the head of a French army, or by the erroneous construction of three of the Judges of the Supreme Court of the United States? To them the privation of political and individual rights would be the same. In both instances they would have lost the power essential to freedom, to the right of self-government. In the former case their conscious humiliation would be less than in the latter, in proportion to the sturdiness of the resistance they would feel conscious of having made, and in proportion to the hope they might entertain, of emancipating themselves by some happy effort of valor, and thereby regaining their rights; but in the latter case the tyrant code to which Kentucky is subjected by that decision, is in-

accessible, perpetual, and incapable of being changed, beneficially or suitably, to the condition of Kentucky, by any power beneath the sun.

It cannot be denied, that the states, before the formation of the constitution of the United States, possessed the power of legislating over the territory within their limits. It cannot be asserted, that a surrender of that power was made in that instrument, by the former to the latter, or that any restraint upon the exercise of that power by the states, is to be found in that constitution. The 10th amendment to that instrument provides expressly, that "the powers not delegated (therein) to the United States, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The provision in that constitution, for the formation of new states, and their admission into the Union, evidently contemplates their possession of those powers essential to sovereignty, which were retained by the old states.

That the states of the Union should be sovereign, and co-equally so, seems to be, not only contemplated, but enjoined by the constitution of the United States. In all their political franchises, in relation to the government of the nation, they are most evidently so; and in all their political rights, in relation to themselves, they cannot, if they were so inclined, be otherwise. The sovereign state power, is most evidently not an article which a state can, by compact or otherwise, either enhance or diminish.

The good of the *whole* requires equiponderance in the parts; and if that equilibrial power could be disturbed or destroyed by any one of the states, by paction with another, or otherwise, then would the *minor* control the *major*, and then would the chances against the perpetuity of the government of the United States, be as twenty-four to one. If these positions be true, and this reasoning be correct, it will be difficult to ascertain how the court could have arrived at the conclusion, that the district of Kentucky, in the view to become a sovereign state, stipulated with Virginia to renounce forever that portion of sovereign power which was necessary for appropriate legislation over her territory, and without which she could not exist as an independent state.

The laws which the court vacated, in that decision, were exacted from the Legislature of Kentucky, by the condition and circumstances of the country. They were, from the multiplicity of conflicting claims to the lands within the state, of vital interest to its prosperity and repose. They were demanded not less by justice than policy; they secured the honest but deluded occupant, who believed himself proprietor, because he had been the purchaser of the land which he occupied, from the loss of the labor of his life, in case of eviction by a paramount title, and they had the sanction of the example of Virginia. That state, when in a like situation, had passed laws upon which those of Kentucky were modelled. The laws enacted by Virginia, had performed their functions, and expired long anterior to the erection of Kentucky into a state. The occasion had ceased, and with

it, the laws. Most of the states, particularly those in which the titles to land were dubious and perplexed, have had occasion for laws of the same character, and have enacted them. The condition of no state ever demanded more imperiously such legislative provisions, than that of Kentucky; in no state could their vacation inflict greater and more extensive injury upon the people, than in Kentucky. But the injury inflicted upon the people, great and extensive as it is, and much as it is deplored, weighs but comparatively little with these remonstrants. It is the *principle* which that decision establishes, at which they *shudder*, and with which they can never be reconciled.

The people of Kentucky, tutored in the school of adversity, can bear, and with patience, too, the frowns of destiny, and all the adverse occurrences to which communities are liable; they can bear any thing but degradation and disfranchisement. They cannot bear to be construed out of their right of self-government; they value their freedom above every thing else, and are as little inclined to be *reasoned* out of it, as they would be to surrender it to *foreign force*.

These remonstrants are not unaware, that the states will sometimes err in the exercise of the legislative power; but they cannot concede, that the exercise of that power should, on that account, be denied to them. Such a concession would strike at the root of the powers believed to be necessary to the freedom and independence of the states. For, to what body, upon that principle, could the legislative department of government be confided? Where shall we find that body of magistracy, which possesses the high prerogative of infallibility? If we explore the judicial department, it will be found, that even there, whence passion, the constant associate, and frequently the parent, of error, is proscribed, the efforts to *correct*, are but little less frequent and strenuous than they were, in the first instance, to avoid error. Every body of magistracy, being necessarily composed of erratic materials, may be expected to err. Error, when committed in the exercise of its legitimate powers, by the legislative body, must, necessarily, be left to that department for correction. It is the high prerogative of the Legislature, to correct whatever errors it may commit, within the legitimate sphere of its action. It is only when it transcends, *obviously* and *palpably*, the limits assigned by the constitution to the exercise of its powers, that the judiciary can vacate its enactions. It is surely not competent for the court to invalidate a law, because it shall be thought by that tribunal to be unequal, impolitic, or inexpedient in its provisions. The policy or expediency of a law, can be judged of by those alone, who are intimately acquainted with the class of subjects to which it relates, and the connection which exists between those subjects, and other subjects of interest to the community; in short, with the complex concerns of the community. In this view, the power of local legislation was retained by the states; but it was retained to but little purpose, if a central tribunal is to pass upon the laws enacted by the states. The power of legislation must be confided somewhere. It is of the essence of freedom, that it

should be exerted by those who are the subjects of the law; that the people who compose the society, should enact the laws which the society needs. The possession or destitution of that power constitutes the *mighty difference* which exists between *freedom* and *slavery*. Kentucky claims to possess the power of legislating for itself; the decision denies her that power in relation to the most important subjects of its exercise, in relation to her own territory. The decision was given by three, a minority of the judges who compose that tribunal. There was a fourth judge on the bench; he dissented. Had the third agreed with the fourth, Kentucky had not been disfranchised; so that, in that particular case, the political destiny of a state was decided by a solitary judge. Can this appeal to the Congress, by the state of Kentucky, upon a subject in which she is so vitally interested, be unavailing? And has not the state a right to expect, that her co-equal sovereignty with the other states of the Union will be guarantied to her by that body? Has she not a right to expect that the Congress will, either by passing a law requiring, when any question shall come before that tribunal involving the validity of a law of any of the states, that a concurrence of at least *two thirds* of all the judges shall be necessary to its vacation; or increasing the number of the judges, and thereby multiplying the chances of the states to escape the like calamities, and of this state to escape from its present thraldom, by exacting the exercise of more deliberation, and an increased volume of intellect, upon all such questions? These remonstrants would not presume to dictate to the Congress of the United States the mode to be pursued by that body, for the extrication of this state from the unhappy posture in which it has been placed by the decision of that court. They have confidence in the wisdom and virtue of the body they address; they have an invincible consciousness of their rights, and they entertain no doubt, but that the Congress will vindicate them in a manner honorable to itself, and satisfactory to Kentucky.

Resolved by the General Assembly of the Commonwealth of Kentucky, That a copy of the foregoing remonstrance be transmitted, by the Governor, to each of our members in the House of Representatives and the Senate of Congress, with the request, that they severally use their best exertions to produce the result at which it aims.

G. ROBERTSON,
Speaker of the House of Representatives.
W. T. BARRY,
Speaker of the Senate.

Approved, January 7th, 1824.

JOHN ADAIR.

By the Governor:
THOMAS B. MONROE, *Secretary.*

OPINION OF THE COURT.

Mr. Justice WASHINGTON delivered the opinion of the Court. In the examination of the first question stated by the Court below, we are naturally led to the following inquiries: 1. Are the rights and interests of lands lying in Kentucky, derived from the laws of Virginia prior to the separation of Kentucky from that state, as valid and secure, under the above acts, as they were under the laws of Virginia, on the 18th of December, 1789? If they were not, then,

2dly. Is the Circuit Court, in which this cause is depending, authorized to declare those acts, so far as they are repugnant to the laws of Virginia, existing at the above period, unconstitutional?

The material provisions of the act of 1797, are as follow:

1. That the occupant of land from which he is evicted by better title, is, in all cases, excused from the payment of rents and profits, accrued prior to actual notice of the adverse title, provided his possession, in its inception, was peaceable, and he shews a plain and connected title, in law or in equity, deduced from some record.

2. That the claimant is liable to a judgment against him for all valuable and lasting improvements made on the land, prior to actual notice of the adverse title, after deducting from the amount the damages which the land has sustained, by waste or deterioration of the soil by cultivation.

3. As to improvements made, and rents and profits accrued, *after notice of the adverse title*, the amount of the one was to be deducted from that of the other, and the balance was to be added to, or subtracted from, the estimated value of the improvements made before such notice, as the nature of the case should require. But it was *provided* for by a subsequent clause, that in no case should the successful claimant be obliged to pay for improvements made *after notice*, more than what should be equal to the rents and profits.

4. If the improvements exceed the value of the land in its unimproved state, the claimant was allowed the privilege of conveying the land to the occupant, and receiving, in return, the assessed value of it without the improvements, and thus to protect himself against a judgment and execution for the value of the improvements. If he should decline doing this, he might recover possession of his land: but then he must pay the estimated value of the improvements, and lose also the rents and profits accrued before notice of the claim. But, to entitle him to claim the value of the land, as above mentioned, he must give bond and security to warrant the title.

The act of 1812 contains the following provisions: 1. That the peaceable occupant of land, who supposes it to belong to him, in virtue of some legal or equitable title, founded on a record, is to be paid by the successful claimant for his improvements. 2. But the claimant may avoid the payment of the value of such improvements, if he please, by relinquishing his land to the occupant, and be paid its estimated value in its unimproved state: thus,

If he elect to pay for the value of the improvements, he is to give bond and security to pay the same, with interest, in different instalments. If he fail to do this, or if the value of the improvements exceed three-fourths the value of the unimproved land, an election is given to the occupant to have a judgment entered against the claimant for the assessed value of the land, if unimproved, with interest, and by instalments.

But if the claimant is not willing to pay for the improvements, and they should exceed three-fourths the value of the unimproved land, the occupant is *obliged* to give bond and security to pay the assessed value of the land, with interest, which, if he fail to do, judgment is to be entered against him for such value; the claimant releasing his right to the land, and giving bond and security to warrant the title.

If the value of the improvements does not exceed three-fourths that of the land, then the occupant is not *bound* (as he is in the former case) to give bond and security to pay the value of the land; but he may claim a judgment for the value of his improvements, or take the land; giving bond and security, as before mentioned, to pay the estimated value of the land.

3. The exemption of the occupant from the payment of the rents and profits extends to all such as accrued during his occupancy, before judgment rendered against him in the first instance. But such as accrue after such judgment, for a term not exceeding five years, as also waste and damages committed by the occupant, *after suit brought*, are to be deducted from the value of the improvements, or the court may render judgment for them against the occupant.

4. The amount of such rents and profits, damages and waste; also, the value of the improvements, and of the land, clear of the improvements, are to be ascertained by commissioners, to be appointed by the court, and who act on oath.

These laws differ from each other only in degree; in principle they are the same. They agree in depriving the rightful owner of the land, of the rents and profits received by the occupant up to a certain period; the first act fixing it to the time of actual notice of the adverse claim, and the latter act to the time of the judgment rendered against the occupant. They also agree in compelling the successful claimant to pay, to a certain extent, the assessed value of the improvements made on the land by the occupant.

They differ in the following particulars:

1. By the former act, the improvements, to be paid for, must be valuable and lasting. By the the latter, they need not be either.

2. By the former, the successful claimant was entitled to a deduction from the value of the improvements for all damages sustained by the land, by waste or deterioration of the soil by cultivation, *during the occupancy of the defendant.* By the latter, he is entitled to such a deduction only, for the damages and waste committed *after suit brought.*

3. By the former, the claimant was bound to pay for such improvements only, as were made *before notice of the adverse title;* if those

made afterwards, should exceed the rents and profits which afterwards accrued, then he was not liable beyond the rents and profits for the value of such improvements. By the latter, he is liable for the value of all improvements made *up to the time of the judgment*, deducting only the rents and profits accrued, and the damage and waste committed after suit brought.

4. By the former, the claimant might, if he pleased, protect himself against a judgment for the value of the improvements, by surrendering the land to his adversary, and giving bond and security to warrant the title. But he was not bound to do so, nor was his giving bond and security to pay the value of the improvements, a prerequisite to his obtaining possession of his land, nor was the judgment against him made a lien on the land.

By the latter act, the claimant is bound to give such bond, at the peril of losing his land; for, if he fail to give it, the occupant is at liberty to keep the land, upon giving bond and security to pay the estimated value of it unimproved; and even this he may avoid where the value of the improvements exceeds three-fourths that of the land, unless the claimant will convey to the occupant his right to the land; for, upon this condition alone, is judgment to be rendered against the occupant for the assessed value of the land.

The only remaining provision of these acts, which is at all important, and is not comprised in the above view of them, is the mode pointed out for estimating the value of the land in its unimproved state, of the improvements, and of the rents and profits; and this is the same, or nearly so, in both: so that it may be safely affirmed, that every part of the act of 1797 is within the purview of the act of 1812; and, consequently, the former act was repealed by the repealing clause contained in the latter.

In pursuing the first head of the inquiry, therefore, to which this case gives rise, the court will confine its observations to the act of 1812, and compare its provisions with the law of Virginia, as it existed on the 18th of December, 1789.

The common law of England was, at that period, as it still is, the law of that state; and we are informed, by the highest authority, that a right to land, by that law, includes the right to enter on it, when the possession is withheld from the right owner; to recover the possession by suit, to retain the possession, and to receive the issues and profits arising from it. (*Altham's case* 8 *Co.* 299.) In *Liford's case*, (11 *Co.* 46,) it is laid down that the regress of the disseisee revests the property in him in the fruits or profits of the land, as well those that were produced by the industry of the occupant, as those which were the natural production of the land, not only against the disseisor himself, but against his feoffee, lessee, or disseisor; "for," says the book, "the act of my disseisor may alter my action, but cannot take away my action, property, or right; so that after the regress, the disseisee may seize these fruits, though removed from the land, and the only remedy of the disseisor in such case, is to recover their value against the claim of damages." The doctrine

laid down in this case, that the disseisee can maintain trespass only against the disseisor for the rents and profits, is, with great reason, overruled in the case of *Holcomb* v. *Rawlins*, (*Cro. Eliz.* 540.) (See also *Bull. N. P.* 87.

Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified, and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged; but it is impaired and rendered insecure, according to the nature and extent of such restrictions.

A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus, a devise of the profits of land, or even a grant of them, will pass a right to the land itself. (*Shep. Touch.* 93. *Co. Litt.* 4 *b.*) "For what," says Lord Coke, in this page, "is the land, but the profits thereof."

Thus stood the common law in Virginia, at the period before mentioned; and it is not pretended that there was any statute of the state less favorable to the rights of those who derived title under her, than the common law. On the contrary, the act respecting writs of rights, declares, in express terms, that, "if the demandant recover his seisin, he may recover damages, to be assessed by the recognitors of assize, for the tenant's withholding possession of the tenement demanded;" which damages could be nothing else but the rents and profits of the land, (2 vol. Last Revisal, p. 463.) This provision of the act was rendered necessary on account of the intended repeal of all the British statutes, and the denial of damages by the common law in all real actions, except in assize, which was considered as a mixed action. [Co. Litt. 257.] But in trespass *quare clausum fregit*, damages were always given at common law. (10 Co. 116.) And that the successful claimant of land in Virginia, who recovers in ejectment, was, at all times, entitled to recover rents and profits in an action of trespass, was not and could not be questioned by the counsel for the tenant in this case.

If then, such was the common and statute law of Virginia, in 1789, it only remains to inquire, whether any principle of equity was recognized by the courts of that state, which exempted the occupant of land from the payment of rents and profits to the real owner, who has successfully established his right to the land, either in a court of law or of equity? No decision of the courts of that state was cited, or is recollected, which, in the remotest degree, sanctions such a principle.

The case of *Southall* v. *M'Kean*, which was much relied upon by the counsel for the tenant, relates altogether to the subject of *improvements*, and decides no more than this: that, if the *equitable* owner of land, who is conusant of his right to it, will stand by and see another occupy and improve the property, without asserting his right to it, he shall not, in equity, enrich himself by the loss of another, which it was in his power to have prevented; but, must be satisfied to recover the value of the land, independent of the improvements. The acquiescence of the owner in the adverse possession of a person whom he found engaged in making valuable improvements on the property, was little short of a fraud, and justified the occupant in the conclusion, that the equitable claim which the owner asserted, had been abandoned. How different is the principle of this case from that which governs the same subject by the act under consideration. By this, the principle is applicable to all cases, whether at law or in equity—whether the claimant knew, or did not know, of his rights, and of the improvements which were making on the land, and even after he has asserted his right by suit.

The rule of the English Court of Chancery, as laid down in 1 *Madd. Chanc.* 72, is fully supported by the authorities to which he refers. It is, that equity allows an account of rents and profits in all cases, from the time the title accrued, provided that do not exceed six years, unless under special circumstances; as, where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared; or, where there has been laches in the plaintiff, in not asserting his title; or, where the plaintiff's title appeared by deeds in a stranger's custody; in all which cases, and others, similar to them in principle, the account is confined to the time of filing the bill. The language of Lord Hardwicke, in *Dormer* v. *Fortescue*, (3 Atk. 128,) which was the case of an infant plaintiff, is remarkably strong. "Nothing," he observes, "can be clearer, both in law and equity, and from natural justice, than that the plaintiff is entitled to the rents and profits from the time when his title accrued." His lordship afterwards adds, that, "where the title of the plaintiff is purely equitable, that court allows the account of rents and profits from the time the title accrued, unless, under special circumstances, such as have been referred to."

Nor is it understood by the court, that the principles of the act under consideration, can be vindicated by the doctrines of the civil law, admitting, which we do not, that those doctrines were recognized by the laws of Virginia, or by the decisions of the Courts.

The exemption of the occupant by that law, from an account for profits, is strictly confined to the case of a *bona fide* possessor, who, not only *supposes* himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. Most unquestionably this character cannot be maintained for a moment, after the occupant has notice of an adverse claim, especially, if that be followed up by a suit to recover the

possession. After this he becomes a *malæ fidei* possessor, and holds at his peril, and is liable to restore all the mesne profits, together with the land. (*Just.* Lib. 2. tit. 1. s. 35.)

There is another material difference between the civil law and the provisions of this act, altogether favorable to the right of the successful claimant. By the former, the occupant is entitled only to those fruits, or profits of the land, which were produced by his own industry, and not even to these, unless they were consumed; if they were realized, and contributed to enrich the occupant, he is accountable for them to the real owner, as he is for all the natural fruits of the land. (See *Just.* the section before quoted, *Lord Kaimes*, B. 4. c. 1. p. 411. *et seq.*) *Puffendorf*, indeed, (B. 4: c. 7. s. 3.) lays it down in broad and general terms, that fruits of industry, as well as those of nature, belong to him who is master of the thing from which they flow.

By the act in question, the occupant is not accountable for profits, from whatever source they may have been drawn, or however they may have been employed, which were received by him prior to the judgment of eviction.

But, even these doctrines of the civil law, so much more favorable to the rights of the true owner of the land than the act under consideration, are not recognized by the common law of England. Whoever takes and holds the possession of land, to which another has a better title, whether by disseisin, or under a grant from the disseisor, is liable to the true owner for the profits which he has received, of whatever nature they may be, and whether consumed by him or not, and the owner may even seize them, although removed from the land, as has already been shown by *Liford's case.*

We are not aware of any common law case which recognizes the distinction between a *bonæ fidei* possessor, and one who holds *malæ fidei*, in relation to the subject of rents and profits; and we understand *Liford's case*, as fully approving, that the right of the true owner to the mesne profits, is equally valid against both. How far this distinction is noticed in a court of equity has already been shown.

Upon the whole, then, we take it to be perfectly clear, that according to the common law, the statute law of Virginia, the principles of equity, and even those of the civil law, the successful claimant of land is entitled to an account of the mesne profits received by the occupant, from some period prior to the judgment of eviction or decree. In a real action, as this is, no restriction whatever is imposed by the law of Virginia upon the recognitors, in assessing the damages for the demandant, except that they should be commensurate with the withholding of the possession.

If this act of Kentucky renders the rights of claimants to lands under Virginia, less valid and secure than they were under the laws of Virginia, by depriving them of the fruits of their land during its occupation by another, its provisions, in regard to the value of the improvements, put upon the land by the occupant, can, with still less reason, be vindicated. It is not alleged by any person, that such a

claim was ever sanctioned by any law of Virginia, or by her courts of justice. The case of Southall vs. M'Kean, has already been noticed and commented upon. It is laid down, we admit, in *Coalter's case*, (5 *Co.* 30,) that the disseisor, upon a recovery against him, may recoup the damages to the value of all that he has expended in amending the houses. (See, also, *Bro.* tit. *Damages*, p. 82, who cites 24 *Edw.* III. 50.) If any common law decision has ever gone beyond the principle here laid down, we have not been fortunate enough to meet with it. The doctrine of *Coalter's case* is not dissimilar in principle from that which Lord Kaimes considers to be the law of nature. His words are, "it is a maxim suggested by nature, that reparations and meliorations bestowed upon a house, or on land, ought to be defrayed out of the rents. By this maxim we sustain no claim against the proprietor for meliorations, if the expense exceed not the rents levied by the *bonæ fidei* possessor." He cites *Papinian*, L. 48, *de rei vindicatione.*

Taking it for granted, that the rule, as laid down in Coalter's case, would be recognized as good law by the courts of Virginia, let us see in what respects it differs from the act of Kentucky. That rule is, that meliorations of the property, (which, necessarily mean valuable and lasting improvements,) made at the expense of the occupant of the land, shall be set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession. But, by the act, the occupant is entitled to the value of the improvements, to whatever extent they may exceed that of the profits, not on the ground of set off against the profits, but as a substantive demand. For, the account for improvements is carried down to the day of the judgment, although the occupant was, for a great part of the time, a *malæ fidei* possessor, against whom no more can be offset, but the rents and profits accrued *after suit brought.* Thus, it may happen, that the occupant who may have enriched himself to any amount by the natural, as well as by the industrial products of land, to which he had no legal tital, (as by the sale of timber, coal, ore, or the like,) is accountable for no part of those profits, but such as accrued after suit brought; and, on the other hand, may demand full remuneration for all the improvements made upon the land, although they were placed there by means of those very profits, in violation of that maxim of equity and natural law, *nemo debet locupletari aliena jactura.*

If the principle which this law asserts, has a precedent to warrant it, we can truly say, that we have not met with it. But we feel the fullest confidencc in saying, that it is not to be found in the laws of Virginia, or in the decisions of the courts.

But the act goes further then merely giving to the occupant a substantive claim against the land for the value of the improvements, beyond that of the profits received since the suit brought. It creates a binding lien on the land for the value of the improvements, and transfers the right of the successful claimant in the land to the occupant, who appears, judicially, to have no title to it, unless the former will give security to pay such value within a stipulated period. In other words, the claimant is permitted to purchase his own land, by

paying to the occupant whatever sum the commissioners may estimate the improvements at, whether valuable and lasting, or worthless and unserviceable to the owner, although they were made with the money justly and legally belonging to the owner; and upon these terms only, can he recover possession of his land.

If the law of Virginia has been correctly stated, need it be asked, whether the right and interest of such a claimant is as valid and secure under this act, as it was under the laws of Virginia, by which, and by which alone, they were to be determined? We think this can hardly be asserted. If the article of the compact, applicable to this case, meant any thing, the claimant of land under Virginia had a right to appear in a Kentucky Court, as he might have done in a Virginia Court, if the separation had not taken place, and to demand a trial of his right by the same principles of law which would have governed his case in the latter state. What those principles are, have already been shown.

If the act in question does not render the right of the true owner less valid and secure than it was under the laws of Virginia, then an act declaring that no occupant should be evicted, but upon the terms of his being paid the value, or double the value of the land, by the successful claimant, would not be chargeable with that consequence, since it cannot be denied but that the principle of both laws would be the same.

The objection to a law on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however, minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is, that, if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage.

2. The only remaining question is, whether this act of 1812 is repugnant to the constitution of the United States, and can be declared void by the Circuit Court from which this comes by adjournment.

But, previous to the investigation of this question, it will be proper to relieve the case from some preliminary objection to the validity and construction of the compact itself.

1st. It was contended by the counsel for the tenant, that the compact was invalid *in toto*, because it was not made in conformity with the provisions of the constitution of the United States; and, if not invalid to that extent, still, 2dly, the clause of it applicable to the point in controversy was so, inasmuch as it surrenders, according to the construction given to it by the opposite counsel, rights of sovereignty which are unalienable.

1. The first objection is founded upon the allegation, that the compact was made without the consent of Congress, contrary to the 10th

section of the first article, which declares, that "no state shall, without the consent of Congress, enter into any agreement or compact with another state, or with a foreign power." Let it be observed, in the first place, that the constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason. The only question in cases which involve that point is, has Congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity? Now, how stands the present case? The compact was entered into between Virginia and the people of Kentucky, upon the express condition, that the general government should, prior to a certain day, assent to the erection of the district of Kentucky into an independent state, and agree, that the proposed state should, immediately after a certain day, or at some convenient time future thereto, be admitted into the federal Union. On the 28th of July, 1790, the convention of that district assembled, under the provisions of the law of Virginia, and declared its assent to the terms and conditions prescribed by the proposed compact; and that the said district should become a separate state on the 1st of June, 1792. These resolutions, accompanied by a memorial from the convention, being communicated to the President of the United States and to Congress, a report was made by a committee, to whom it was referred, setting forth the agreement of Virginia, that Kentucky should be erected into a state, *upon certain terms and conditions*, and the acceptance by Kentucky *upon the terms and conditions so prescribed;* and, on the 4th of February, 1791, Congress passed an act, which, after referring to the compact, and the acceptance of it by Kentucky, declares the consent of that body to the erection of the said district into a separate and independent state, upon a certain day, and receiving her into the Union.

Now, it is perfectly clear that, although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent state, without the assent of Virginia, or upon terms variant from those which Virginia had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed, by a solemn act, the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this, is to deny the validity of the act of Congress, without which, Kentucky could not have become an independent state; and then it would follow, that she is at this moment part of the state of Virginia, and all her laws acts of usurpation. The counsel who urged this argument, would not, we are persuaded, consent to this conclusion; and yet, it would seem to be inevitable, if the premises insisted upon be true.

2. The next objection, which is to the validity of the particular clause of the compact involved in this controversy, rests upon a principle, the correctness of which remains to be proved. It is practically opposed by the theory of all limited governments, and especially of those which constitute the Union. The powers of legislation granted to the government of the United States, as well as to the several state governments, by their respective constitutions, are all limited. The article of the constitution of the United States, involved in this very case, is one, amongst many others, of the restrictions alluded to. If it be answered, that these limitations were imposed by the people in their sovereign character, it may be asked, was not the acceptance of the compact the act of the people of Kentucky in their sovereign character? If, then, the principle contended for be a sound one, we can only say, that it is one of a most alarming nature; but which it is believed cannot be seriously entertained by an American statesman or jurist.

Various objections were made to the literal construction of the compact, one only of which we deem it necessary particularly to notice. That was, that, if it be so construed as to deny to the legislature of Kentucky the right to pass the act in question, it will follow, that that state cannot pass laws to affect lands, the title to which was derived under Virginia, although the same should be wanted for public use. If such a consequence grows necessarily out of this provision of the compact, still we perceive no reason why the assent to it by the people of Kentucky should not be binding on the legislature of that state. Nor can we perceive, why the admission of the conclusion involved in the argument should invalidate an express article of the compact in relation to a quite different subject. The agreement, that the rights of claimants under Virginia, should remain as valid and secure as they were under the laws of that state, contains a plain, intelligible proposition, about the meaning of which, it is impossible there can be two opinions. Can the government of Kentucky fly from the agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient, or even pernicious to the state, in some other respect? The court cannot perceive how this proposition could be maintained.

But the fact is, that the consequence drawn by counsel from a literal construction of this article of the compact, cannot be fairly deduced from the premises: because, by the common law of Virginia, if not by the universal law of all free governments, private property may be taken for public use, upon making to the individual a just compensation. The admission of this principle never has been imagined by any person as rendering his right to property less valid and secure than it would be, were it excluded; and, consequently, it would be an unnatural and forced construction of this article of the compact, to say that it included such a case.

We pass over the other observations of counsel upon the construction of this article, with the following remark: that, where the words of a law, treaty, or contract, have a plain and obvious meaning, all

construction, in hostility with such meaning, is excluded. This is a maxim of law and a dictate of common sense: for, were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.

We now come to the consideration of the question, whether this court has authority to declare the act in question unconstitutional and void, upon the ground, that it impairs the obligation of the compact? This is denied, for the following reasons: It is insisted, in the first place, that this court has no such authority, where the objection to the validity of a law is founded upon its opposition to the constitution of Kentucky, as it was in this case. It will be a sufficient answer to this observation, that our opinion is founded exclusively upon the constitution of the United States.

2dly. It was objected that Virginia and Kentucky, having fixed upon a tribunal to determine the meaning of the compact, the jurisdiction of this court is excluded. If this be so, it must be admitted, that all controversies which involve a construction of the compact, are equally excluded from the jurisdiction of the *state courts* of Virginia and Kentucky. How, then, are those controversies, which we were informed by the counsel on both sides crowded the Federal and state courts of Kentucky, to be settled? The answer, we presume, would be, by commissioners appointed by those states. But none such have been appointed; what then? Suppose either of those states, Virginia for example, should refuse to appoint commissioners; are the occupants of lands, to which they have no title, to retain their possessions until this tribunal is appointed, and to enrich themselves, in the mean time, by the profits of them, not only to the injury of non-residents, but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it.

But how happens it that the questions submitted to this court have been entertained and decided, by the courts of Kentucky, for twenty-five years, as we were informed by the counsel? Have these courts, cautious and learned as they must be acknowledged to be, committed the crime of usurping a jurisdiction which did not belong to them? We should feel very unwilling to come to such a conclusion.

The answer, in few words, to the whole of the argument, is to be found in the explicit language of that provision of the compact, which respects the tribunal of the commissioners.

It is to be appointed in no case but where a complaint or dispute shall arise, not between *individuals*, but between *the commonwealth of Virginia and the state of Kentucky, in their high sovereign characters.*

Having thus endeavored to clear the question of these preliminary objections, we have only to add, by way of conclusion, that the duty, not less than the power, of this court, as well as of every other court in the Union, to declare a law unconstitutional which impairs the

obligation of contracts, whatever may be the parties to them, is too clearly enjoined by the Constitution itself, and too firmly established by the decision of this and other courts, to be now shaken; and that those decisions entirely cover the present case.

A slight effort to prove that a compact between two states is not a case within the meaning of the Constitution, which speaks of *contracts*, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties to do, or not to do, certain acts, it must be obvious that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonimous; and in *Fletcher* v. *Peck*, the chief justice defines a *contract* to be a *compact* between two or more parties. The principles laid down in that case are, that the Constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a state and individuals; and that a state has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals. Kentucky, therefore, being a party to the compact which guarantied to claimants of land lying in that state, under titles derived from Virginia, their rights as they existed under the laws of Virginia, was incompetent to violate that contract, by passing any law which rendered those rights less valid and secure.

It was said by the counsel for the tenant, that the validity of the above laws of Kentucky has been maintained by an unvarying series of decisions of the courts of that state, and by the opinions and declarations of the other branches of her Government. Not having had an opportunity of examining the reported cases of the Kentucky courts, we do not feel ourselves at liberty to admit or deny the first part of this assertion. We may be permitted, however, to observe, that the principles decided by the Court of Appeals of that state, in the case of *Hoyes' heirs* v. *M'Murray*, a manuscript report of which was handed to the court when this cause was argued, are in strict conformity with this opinion. As to the other branches of the government of that state, we need only observe, that, whilst the legislature has maintained the opinion, most honestly, we believe, that the acts of 1797 and 1812, were consistent with the compact, the objections of the Governor to the validity of the latter act, and the reasons assigned by him in their support, taken in connection with the above case, incline us strongly to suspect that a great diversity of opinion prevails in that state upon the question we have been examining. However this may be, we hold ourselves answerable to God, our consciences, and our country, to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may. If we have ventured to entertain a wish as to the result of the investigation which we have laboriously given to this case, it was, that it might be favorable to the validity of the laws—our feelings being always on that side of the question, unless the objections to them are fairly and clearly made out.

The above is the opinion of the majority of the court.

The opinion given upon the first question proposed by the Circuit Court renders it unnecessary to notice the second question.

Mr. Justice JOHNSON.—Whoever will candidly weigh the intrinsic difficulties which this case presents, must acknowledge that the questions certified to this court are among those on which any two minds may differ, without incurring the imputation of wilful or precipitate error.

We are fortunate, in this instance, in being placed aloof from that unavoidable jealousy which awaits decisions founded on appeals from the exercise of state jurisdiction. This suit was originally instituted in the Circuit Court of the United States; and the duty now imposed upon us, is, to decide, according to the best judgment we can form, on the law of Kentucky. We sit and adjudicate, in the present instance, in the capacity of judges of that state. I am bound to decide acccording to those principles which ought to govern the courts of that state, when adjudicating between its own citizens.

The first of the two questions certified to this court, is, whether the laws, well known by the description of the occupying claimant laws of Kentucky, are constitutional?

The laws known by that denomination are the acts passed the 27th of February, 1797, and the 31st of January, 1812. The general purport of the former is, to give to a defendant in ejectment, compensation for actual improvements innocently made upon the land of another. The practical effect of the latter is, to give him compensation for all the labor and expense bestowed upon it, whether productive of improvement or not.

The two acts differ as to the time from which damages and rents are to be estimated; but concur,

1st. In enjoining on the courts the substitution of commissioners, for a jury, in assessing damages;

2dly. In converting the plaintiff's right to a judgment, after having established his right to land, from an absolute, into a conditional right; and,

3dly. Under some circumstances, in requiring that judgment should be given for the defendant, and that the plaintiff, in lieu of land, should recover an assessed sum of money, or, rather, bonds to pay that sum; i. e. another right of action, if any thing.

The second question certified, is, on which of these two acts the Court shall give judgment, and seems to have arisen out of an argument, insisted on at the trial, that, as the suit was instituted prior to the passage of the last act, it ought to be adjudicated under the first act, notwithstanding that the act of 1812 was in force when judgmen was given.

As the language of the first question is sufficiently general to embrace all questions that may arise, either under the State or United States' constitution, much of the argument before this Court turned upon the inquiry, whether the rights of the parties were affected by

that article of the United States' constitution which makes provision against the violation of contracts?

The general question I shall decline passing an opinion upon. I consider such an inquiry as a work of supererogation, until the benefit of that provision in the constitution shall be claimed, in an appeal from a decision of a court of the state. There is, however, one view of this point, presented by one of the gentlemen who appeared on behalf of the state, which cannot pass unnoticed. It was contended, that the constitution of Kentucky, in recognizing the compact with Virginia, rcognizes it only as a compact; and, therefore, that it acquires no more force, under that constitution, than it had before; and, but for the constitution of Kentucky, questions arising under it were of mere diplomatic cognizance, and were not, by the constution, transmuted into subjects of judicial cognizance.

I am constrained to entertain a different view on this subject; and, without passing an opinion on the legal effect of the compact, in its separate existence, upon individual rights, I must adopt the opinion, that, when the people of Kentucky declared, that "the compact with the state of Virginia, subject to such alterations as may be made therein, agreeably to the mode prescribed by the said compact, shall be considered as part of the constitution," they enacted it as a *law* for themselves, in all those parts in which it was previously obligatory on them as a *contract;* and made it a fundamental law, one which could only be repealed in the mode prescribed for altering that constitution. Had it been enacted in the ordinary form of legislation, notwithstanding the absurdity insisted on, of enacting laws obligatory on Virginia, it is certain, that the maxim *utile per inutile non vitiatur*, would have been applied to it, and it would have been enforced as a law of Kentucky in every court of justice sitting in judgment upon Kentucky rights. How much more so, when the people thought proper to give it the force and solemnity of a fundamental law?

I, therefore, consider the article of the compact which has relation to this question, as operating on the rights and interests of the parties, with the force of a fundamental law of the state; and, certainly, it can then need no support from viewing it as a contract, unless it be, that the constitution may be repealed by one of the parties, but the contract cannot. While the constitution continues unrepealed, it is putting a fifth wheel to the carriage, to invoke the contract into this cause. It can only eventuate in crowding our dockets with appeals from the state courts.

I consider, therefore, the following extract from the compact as an enacted law of Kentucky: "That all private rights and interests of land within [Kentucky,] derived from the laws of Virginia prior to [their] separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws [*existing in Virginia at the time of the separation.*"] The alterations here made in the phraseology, are such as necessarily result from the adaptation of it to a legislative form. The occupying claimant laws, therefore, must conform to this constitutional provision, or be void: for a legis-

lature, constituted under that constitution, can exercise no power inconsistent with the instrument which created it. The will of the people has decreed otherwise, and the interests of the individual cannot be affected by the exercise of powers which the people have forbidden their legislature to exercise.

To constitute the sovereign and independent state of Kentucky, was, unquestionably, the leading object of the act of Virginia of the 18th of December 1789. To exercise unlimited legislative power over the territory within her own limits, is one of the essential attributes of that sovereignty; and every restraint in the exercise of this power, I consider as a restriction on the intended grant, and subject to a rigorous construction. On general principles, private property would have remained unaffected by the transfer of sovereignty; but, thenceforth, would have continued subject, both as to right and remedy, to the legislative power of the state newly created. The argument for the plaintiff is, that the provision now under consideration goes beyond the recognition or enforcement of this principle, and restrains the state of Kentucky from any legislative act that can, in any way, impair, or encumber, or vary, the beneficiary interests which the grantees of land acquired under the laws of Virginia; or, in other words, that it creates a peculiar tenure on the lands granted by Virginia, which exempts them from that extent of legislative action to which the residue of the state is unquestionably subjected. It must mean this, if it means any thing. For, supposing all the grantees of lands, under the laws of Virginia, in actual possession of their respective premises, unless the lands thus reduced into possession be still under the suppposed protection of this compact, neither could they have been at any time previous. The words of the compact, if they carry the immunity contended for beyond the period of separation, are equally operative to continue it ever after.

But where would this land us? If the state of Kentucky had, by law, enacted that the dower of a widow should extend to a life estate in one-half of her husband's land, would the widow of a Virginian, whose husband died the day after, have lost the benefit of this law, because the laws of Virginia had given the wife an inchoate right in but one-third? This would be cutting deep, indeed, into the sovereign powers of Kentucky, and would be establishing the anomaly of a territory, over which no government could legislate. Not Virginia, for she had parted with the sovereignty; not Kentucky, for the laws of Virginia were irrevocably fastened upon two-thirds of her territory.

But it is contended, that the clause of the compact under consideration, must have meant more than what is implied in every cession of territory, or it was nugatory to have inserted it.

I confess I cannot discover the force of this argument. In the present case, it admits of two answers. The one is found in the very peculiar nature of the land titles created by Virginia, and then floating over the state of Kentucky. Land they were not, and yet all the attributes of real estate were extended to them, and intended, by the compact, to be preserved to them, under the dominion of the

new state. There was, then, something more than the ordinary rights of individuals in the ceded territory to be perpetuated, and enough to justify the insertion of such a provision as a necessary measure. But there is another answer to be found in the ordinary practice of nations in their treaties, in which, from abundant caution, or perhaps diplomatic parade, many stipulations are inserted for the preservation of rights which no civilian would suppose could be affected by a change of sovereignty. Witness the frequent stipulations for the restoration of wrecked goods, or goods piratically taken; witness, also, the 3d article of the treaty ceding Louisiana, and the 6th article of that ceding Florida, both of which are intended to secure to the inhabitants of the ceded territory, rights which, under our civil institutions, could not be withheld from them.

But, let us now reverse the picture, and inquire whether this stipulation of the compact, or of the censtitution, prescribed no limits to the legislative power of Kentucky over the ceded territory. Had the state of Kentucky, immediately after it was organized, passed a law declaring, that, wherever a plaintiff in ejectment, or in a writ of right, shall have established his right in law to recover, the jury shall value the premises claimed, and, instead of judgment for the land, and the writ of possession, the plaintiff shall have his judgment for the value so assessed, and the ordinary process of law to recover a sum of money on judgment. Who is there who would not have felt that this was a mere mockery of the compact, a violation of the first principles of private right, and of faith in contracts? Yet such a law is, in degree, not in principle, variant from the occupying claimant laws under consideration, and the same latitude of legislative power which will justify the one, would justify the other.

But, again, on the other hand, (and I acknowledge that I am groping my way through a labyrinth, trying to lay hold of sensible objects to guide me) who can doubt, that, where private property had been wanted for national purposes, the legislature of Kentucky might have compelled the individual to convey it for a value tendered, notwithstanding it was held under a grant from Virginia, and notwithstanding such a violation of private right had been even constitutionally forbidden by the state of Virginia? Or who can doubt the power of Kentucky to regulate the course of descents, the forms of conveying, the power of devising, the nature and extent of liens, within her territorial limits? For example: by the civil law, the workman who erects an edifice, acquires a lien on both the building and the land it stands upon, for payment of his bill. Why should not the state of Kentucky have adopted this wise and just principle in her jurisprudence? Or why not have extended it to the case of the laborer who clears a field? Yet, in principle, the occupying claimant laws, at least that of 1797, was really intended to engraft this very provision into the Kentucky code, as to the innocent improver of another man's property. It was thought, and justly thought, that, as the state of Virginia had pursued a course of legislation in settling the country, which had introduced such a state of confusion in the titles to landed

property, as rendered it impossible for her to guaranty any specific tract to the individual, it was but fair and right that some security should be held out to him for the labor and expense bestowed in improving the country; and that, where the successful claimant recovered his land, enhanced in value by the labors of another, it was but right that he should make compensation for the enhanced value. To secure this benefit to the occupying claimant, to give a lien upon the land for his indemnity, and avoid the necessity of a suit in equity, were, in fact, the sole objects of the act of 1797. The misfortune of this system appears to have been, that to curtail litigation, by providing the means of closing this account current of rights and liabilities in a court of law, and in a single suit, so as to obviate the necessity of going into equity, or of an action for mesne profits on the one side, and an action for compensation on the other, appears to have absorbed the attention of the legislature. The consequence of which is, that a course of proceeding, quite inconsistent with the simplicity of the common law process, and a curious debit and credit of land, damages, and mesne profits, on the one hand, and of *quantum meruit* on the other, has been adopted, exhibiting an anomaly well calculated to alarm the precise notions of the common law.

But suppose that, instead of imposing this complex mode of coming at the end proposed, the legislature of Kentucky had passed a law simply declaring, that the innocent improver of lands, without notice, should have his action to recover indemnity for his improvements, and a lien on the premises so improved, in preference to all other creditors; I can see no principle on which such a law could be declared unconstitutional, nor any thing that is to prevent the party from enforcing it in any court having competent jurisdiction.

But the inconsistency which strikes every one, in considering the laws as they now stand, is, that one party should have a verdict, and another, finally, the judgment; that, *eodem fiatu*, the plaintiff should be declared entitled to recover land, and yet not entitled to recover land.

After thus mooting the difficulties of this case, I am led to the opinion, that, if we depart from the restricted construction of the article under consideration, we are left to float on a sea of uncertainty as to the extent of the legislative power of Kentucky over the territory held under Virginia grants; that, if obliged to elect between the assumed exercise and the utter extinction of the power of Kentucky over the subject, I would adopt the former; that every question between those extremes, is one of expediency or diplomacy, rather than of judicial cognizance, and not to be decided before this tribunal. If compelled to decide on the constitutionality of these laws, strictly speaking, I would say, that they, in no wise, impugn the force of the laws of Virginia, under which the titles of landholders are derived, but operate to enforce a right acquired subsequently, and capable of existing consistently with those acquired under the laws of Virginia. I cannot admit, that it was ever the intention of the framers of this Constitution, or of the parties to

this compact, or of the United States, in sanctioning that compact that Kentucky should be forever chained down to a state of hopeless imbecility, embarrassed with a thousand minute discriminations drawn from the common law, refinements on mesne profits, set-offs, &c. appropriate to a state of society, and a state of property having no analogy whatever to the actual state of things in Kentucky, and yet no power on earth existing to repeal, or to alter, or to effect those accommodations to the ever varying state of human things, which the necessities or improvements of society may require. If any thing more was intended, than the preservation of that very peculiar and complex system of land laws then operating over that country, under the laws of Virginia, it would not have extended beyond the maintenance of those great leading principles of the fundamental laws of that State, which, as far as they limited the legislative power of the state of Virginia over the rights of individuals, became, also, blended with the law of the land, then about to pass under a new sovereignty. And if it be admitted, that the state of Kentucky might, in any one instance, have legislated as far as the state of Virginia might have legislated on the same subject, I acknowledge that I cannot perceive where the line is to be drawn, so as to exclude the powers asserted under, at least the first of the laws now under consideration. But it appears to me, that this cause ought to be decided, upon another view of the subject.

The practice of the courts of the United States, that is, the remedy of parties therein, is subject to no other power than that of Congress. By the act of 1789, the practice of the respective state courts was adopted into the courts of the United States, with power to the respective courts, and to the supreme court, to make all necessary alterations. Whatever changes the practice of the respective states may have undergone since that time, that of the United States' courts has continued uniform, except so far as the respective courts have thought it advisable to adopt the changes introduced by the state legislatures.

The District of Kentucky was established while it was yet a part of Virginia. [Judiciary Act, Sept. 24, 1789.] The practice of the state of Virginia, therefore, was made the practice of the United States' courts in Kentucky. Now, according to the practice of Virginia, the plaintiff here, upon making out his title, ought to have had a verdict and judgment in the usual form. Nor can I recognize the right of the State of Kentucky to compel him, or to compel the courts of the United States, to pass through this subsequent process before a Board of Commissioners; and afterwards to purchase his judgment in the mode prescribed by the state laws. I do not deny the right of the state to give the lien, and to give the action for improvements; but I do deny the right to lay the courts of the United States under an obligation to withhold from a plaintiff the judgment, to which, under the established practice of that court, he had entitled himself.

It may be argued, that the courts of the United States in Kentucky

have long acquiesced in a compliance with these laws, and thereby have adopted this course of proceeding into their own practice. This, I admit, is correct reasoning; for the court possesses the power of making rules of practice; and such rules may be adopted by habit, as well as by framing a literal rule. But the facts, with regard to the circuit court here, could only sustain the argument as to the occupying claimant law of 1797, since that of 1812 appears to have been early resisted. Here, however, I am led to an inquiry which will equally affect the validity of both laws, viewed as rules of practice, as affecting a fundamental right, incident to remedies in our own courts of law. It is obviously a leading object of these laws, to substitute a trial by a board of commissioners, for the trial by jury, as to mesne profits, damages and a *quantum meruit*. Without examining how far the legislative power of Kentucky is adequate to this change in its own courts, I am perfectly satisfied, that it cannot be introduced by State authority into the courts of the United States. And, I go further: The Judges of these courts have not power to make the change; for the constitution has too sedulously guarded the trial by jury, [7th article of amendments,] and the judiciary act of the United States both recognizes the separation between common law and equity proceedings, and forbids that any court should blend and confound them.

These considerations lead me to the conclusion, that the defendant is not entitled to judgment under either of the acts under consideration, even admitting them to be constitutional; but, if under either, certainly under that alone, which has been adopted into the practice of the United States' courts in Kentucky.

CERTIFICATE.

This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the district of Kentucky, on certain questions upon which the opinions of the judges of the said circuit court were opposed, and which were certified to this court for their decision, by the judges of the said circuit court, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the act of the said state of Kentucky, of the 27th of February, 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the constitution of the United States; but that the same was repealed by the act of the 31st of January, 1812, to amend the said act; and that the act last mentioned is also repugnant to the constitution of the United States.

The opinion given on the first question submitted to this court by the said circuit court, renders it unnecessary to notice the second question.

All which is ordered to be certified to the said circuit court.

THE PETITION.

The undersigned would most respectfully solicit the Conrt to reconsider the case of Green and Biddle. They are aware that this case has already experienced the special indulgence of the court; and they would not again attempt to obtrude it upon their consideration, if they had not the most unqualified conviction that the interpretation given to the 3d article of the compact between Virginia and Kentucky, in the opinion pronounced in that case is (they would express it with much deference) misconceived and erroneous; nor would they, if the effects of this misinterpretation were, in this, as in common cases, limited to the particular case, have presumed again upon the time and patience of the court; but its effects are likely to be coextensive with the state, and afflicting beyond all parallel.

They, therefore, solicit the patient attention of the court, while they attempt, with the utmost practical brevity, to exhibit what they conceive to be the true construction of that article of the compact. That compact, like all contracts, can only be obligatory to the extent of the will of the contracting parties, expressed therein, or to be inferred therefrom; for it is a settled principle, as well in municipal as natural and moral law, that volition is the only true basis of obligation. When the words of a contract do not express, clearly and explicitly, the will of the parties in relation to the subject matter thereof, it is to be ascertained by construction. In this process all the parts of the contract are to be considered together, and the import of the words employed therein to be explored with an eye, not only to the canons of grammar and philology, but to the nature of the subject matter, and to the character and condition of the contracting parties. By ascertaining, first, the great leading object of the parties, the *end* at which they aimed in the contract, we are enabled to assign to the subordinate subjects embraced by its stipulations, each its true relative subsidiary posture, and thereby avoid that confusion of subjects and of ideas which is but too apt to display its wildering influence in the process of construction, especially in matters of complicacy.

The great leading object, contemplated by the parties to this compact, was the erection of the District of Kentucky, then a portion of the territory of the state of Virginia, into a *sovereign and independent state*. The compact purports to contain the terms upon which Virginia, and the District of Kentucky, the parties thereto, assented to that object.

The first article contains a delineation of the boundaries of the proposed state.

The second consists of pecuniary stipulations exclusively.

The third is in the following words, viz. "That all private rights and interests of lands within the said district, derived from the *laws* of Virginia, *prior* to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws *now* existing in this state."

Fourth. "That the *lands* within the proposed state, of non-resident proprietors, shall not in any case be taxed higher than the lands of residents, at any time prior to the admission of the proposed state to a vote, by its delegates, in Congress, when such non-residents reside out of the United States, nor at any time, either before or after such admission, where such non-residents reside within this commonwealth, within which this stipulation shall be reciprocal; or where such non-residents reside within any other of the United States, which shall declare the same to be reciprocal within its limits; nor shall a neglect of cultivation or improvement of any land within either the proposed state or this commonwealth, belonging to non-residents, citizens of the other, subject such non-residents to forfeiture or other penalty, within the term of six years after the admission of the said state into the Federal Union.

The court, in forming the opinion, seem to have confined their attention exclusively to the provisions of the third article, and to have drawn all their arguments from what they conceived to be the legal import of its phrases. The undersigned would most respectfully suggest the propriety, and even necessity, of considering, at least, the 4th, in connection with the 3d article, in order to ascertain by construction, the true meaning of the latter. Under the conviction that the consideration of the true import of the 4th, is necessary to the just interpretation of the 3d, the two have been herein above literally transcribed.

In construing the 3d article, the first inquiry to be made is, what did the parties to this compact mean by the provision that all private *rights* and *interests* of lands within the said district, *derived* from the *laws* of Virginia, prior to such separation, shall *remain valid and secure under the laws of the proposed state, &c.?* In order to be enabled to answer this question satisfactorily, we should examine the laws referred to in the article itself, by the words *derived* from the *laws* of Virginia. And here we beg leave, most respectfully, to protest against the sentiment of the court, that the common law of England is to be understood as part of those *laws* of Virginia, whence the *rights* and *interests* of lands, in the then district, were *derived*. Because, 1st, no rights or interests of lands in Kentucky originated in the common law of England; and if they did not originate in the common law, they cannot be said to have been derived from it; and next, because the words "laws of Virginia," do not, *ex vi terminorum*, include the common law of England; on the contrary, they exclude that law. We are aware that the common law of England, and the British statutes enacted in aid thereof, before the 4th year of King James the first, were introduced into the state of Virginia by an ordinance of the convention of that state in the year 1776. The common law of England and the British statutes had, after the creation of the ordinance, and by virtue thereof, force in Virginia, not under the denomination of the laws of Virginia, but under the denomination of the common and statute law of England. They were not, either in common parlance, or in the language of judicial decision, designated as the laws of Virginia. They are not so designated in the ordinance

above referred to. The successive revisals of the Virginia laws, contain only the statutes enacted by that state, and they are denominated, by the legislature, the bar and the courts of that state, the Revisals of the *Laws* of Virginia; for instance, the Chancellor's Revisal of the Laws of Virginia. The laws, then, referred to in the 3d article of the compact, under the denomination of the laws of Virginia, *whence* the rights and interests of lands therein mentioned, are stated to be *derived*, were not, we must again respectfully urge, the common or statute law of England. They were those *statute laws* of Virginia, under and by authority of which *alone*, rights and interests of land, in the then district of Kentucky, had accrued.

The first law under which any claim was asserted to land in the district of Kentucky, is an act of the Virginia legislature, passed in the spring of the year 1779, and is known in Kentucky, at this day, by the appellation of the *land* law of Virginia. All the rights which existed to lands in the district of Kentucky, at the date of the compact, were *derived* from that law, and a few subsequent subsidiary enactments, by the legislature of that state. Under that and the subsequent laws of Virginia upon the same subject, the lands in the district of Kentucky had been brought into market, and there existed, at the date of the compact, under those laws, an infinite number of claims to land in that district—claims to more than three times the quantity of all the lands in the district.

The rights under which those claims were asserted, were almost as various in grade and character, as they were numerous. There were proclamation rights, military rights, settlement rights, pre-emption rights, village rights, poor rights, treasury rights, &c. &c. In the preamble to the act of 1779, to which reference has been made, there is, among other matter, the following recital, viz. "And it is necessary for the public weal, that some certain rules should be established for settling and determining the *rights* to such lands, and fixing the principles upon which legal and just claimers shall be entitled to *sue out grants*." See 1 Litt. p. 392.

In this recital, the legislature most certainly employed the word *rights* to import something less than an absolute title, with which, under the name of grant, that word is contrasted. The first section of the same article contains a recital of several of the rights above enumerated, in none of which can that word (rights) be understood, without doing violence to the explicit meaning of the legislature, to mean a consummate title, a grant. The following are some of the closing expressions of that section: "All persons claiming lands upon any of the before *recited rights*, and *under surveys* made, &c. &c. shall, upon the plats and certificates of such surveys being returned into the land office, together with the rights, entry, order, warrant, &c. be entitled to a grant or grants for the same." [1 Litt. 393.] Here, likewise, the word *rights* is defined to mean an inchoate claim to land, a claim in degree lower than that by grant. In the 2d section of the same article, which is in the nature of a proviso to the first, the word rights is employed in the same sense. In the 3d section of

the same article, the words rights and grant are employed by the legislature with the like contrasted import, viz. Rights to mean an imperfect, a qualified claim; grants to mean a perfect and absolute title. [1 Litt. 394.] In short, throughout the wholé of that article and the subsequent enactments, (and they, it is repeated, are the only laws under which rights and interests of lands in Kentucky originated,) those words are employed to designate, indiscriminately, every grade of claim to land, except that by grant. The incipient right, of whatever character, settlement, pre-emption, village or treasury, is merged in the warrant; that is merged in the entry, and that in the survey, and the survey in the grant. The character of the incipient right is defined in the warrant, preseeved throughout each successive grade, and impressed upon the grant, in which, being consummated, it is merged. [1 Litt. 408–10.] But the grant is no where, throughout those articles, pointed at or designated by the term rights or interests. [1 Litt. 414–15.] There is a provision in the act of 1779, to which reference has already been made, in relation to foreigners or aliens, calculated, it is believed, to throw some light upon this subject. It is in the following words: "All persons, as well *foreigners* as others, shall have right to assign or transfer warrants or certificates of survey for lands; and any foreigner purchasing lands, may locate and have the same surveyed, and after returning a certificate of survey to the land office, shall be allowed the term of eighteen months to become a citizen, or transfer his right in such certificate of survey to some citizen of this, or any other of the United States." [1 Litt. 415.] So that aliens could have rights and interests of lands in the district of Kentucky; but they could not have absolute title thereto, while they remained aliens; and eighteen months were afforded to them, to become citizens, and consummate their *rights* in *grants;* or they might transfer their plats and certificates of survey, to citizens who could obtain grants thereon. So far as the claims to land consisted in *rights* and *interests* of lands, according to the statutory meaning of those words, aliens and citizens occupied the same ground, enjoyed, under the statute, the same faculties of appropriation, but no further. Aliens could not possess more than an inchoate title. It would seem, therefore, very clearly, by reference to the only laws of Virginia from which rights and interests of lands in Kentucky were derived, that the rights and interests, meant by the 3d article of the compact, were not those, which, by the operation of the common law of England, result or flow from the *land*, to the person who has the complete legal title thereto; but they were *inchoate* rights, existing in the person who possessed a warrant, an entry, or survey, to the lands embraced therein; and not flowing from the lands to him. It is, therefore, evident, that aliens could have rights and interests of lands in the district of Kentucky, derived from the laws of Virginia; and it is not less evident, that neither the common, nor statute law of England, formed any part of those laws of Virginia from which these rights were derived to aliens. For, those laws, so far from conferring, by their operation, rights of lands upon aliens, disqualified aliens from

possessing those rights; and, as no distinction is made by the statute between citizens and aliens, as to their possession, or their capacity to possess and transfer those rights of lands; and, as the common law negatived their possession by aliens, and could not create and confer them upon citizens, it would seem to follow, very obviously, that the rights of both were derived from the same laws, the statute laws of Virginia, exclusively; and, as obviously, that the rights and interests of lands, mentioned in the third article of the compact, were of the inchoate, imperfect sort, meant by the legislature in its use of the same words, in relation to aliens and citizens indiscriminately. The faculty of transferring them, given by the laws which created them, to those who possessed them, merely by endorsement, would seem to indicate, that they were rights that savored more strongly of the personalty than the realty; that they were rights to the land *acquirable*, rather than *acquired* rights. The warrant, the location, and the survey, were all rights of land, of different grade, giving to the owner an interest in the land commensurate with his grade of right, which interest might be considered as bearing the same relative proportion to that of an absolute title, which the agency producing that grade of right would be considered to bear to the whole series of acts and expenditures necessary to the obtention of a grant. But these rights and interests were contingent; they depended upon the inclination and capacity of their owners to carry them into grant, and upon their exerting that inclination and capacity within the period, and conformably to the modes, prescribed by the statutes.

It may be confidently asserted, that five sevenths of all the claims to lands in the district of Kentucky, at the date of the compact, were of this inchoate and imperfect sort. At that period, grants had issued for but a very small portion of the lands in Kentucky, and these had been obtained chiefly by non-residents, who had, without coming to the country, (a matter not in those days *vastly secure,*) hired the entering and surveying of their lands. They possessed the means of defraying the expenses incident to the most rapid practicable process of appropriation, and they availed themselves of those means. When we inquire what would have been the fate of these imperfect claims, these rights and interests of lands in the district of Kentucky, upon the unconditional erection of that district into a state, we will find the motives which influenced Virginia to exact from Kentucky the stipulations contained in the third article of the compact. These rights must all have perished; Kentucky, without that stipulation, would have been under no legal or political obligation to preserve them, to enact laws for their effectuation; on the contrary, she might have felt a strong disinclination to do so. Without the provisions of that article, Virginia would have been liable to that host of claimants, for whose rights she had made no provision; and the more so, when it was considered, that she had sold rights to more than three times the quantity of land she possessed in the district; and, after having done so, had permitted the very lands which she had thus thrice sold, to be melted down into vacant lands, in order to swell the domain of the proposed state.

Virginia had, therefore, a double motive to exact from Kentucky a stipulation for the validity and security of those rights: 1st. Her own aggravated liability to the claimants; and next, a sense of common justice, not only to the claimants, but to her own reputation. Those rights of land being statutory existences, unknown to, and unprotected by, the common law of England, dependent solely upon the code in which they originated, for their protection and effectuation, needed the provisions of that article of the compact. They must, it is repeated, have perished without it. Not so, in relation to lands existing in grant. They needed no such stipulation. There could be no motive on the part of Virginia, to demand it in their behalf.

The import of a patent for land under the seal of sovereignty, and the laws of its nature and construction, were known and recognized throughout the civilized world. It could not decently have been predicted by Virginia of Kentucky, that she would violate the sanctity of the great seal; that she would outrage those tenures of real property, which all the world beside acknowledge, reverence, and maintain; which war, in its most frenzied mood, would not violate, and which even lawless and triumphant invasion had always forborne to profane.

Besides, the constitution of the United States had been framed and adopted. It existed *proprio vigore*, and had superadded to the security which patent tenures possessed in the universal sentiment of civilized man, the protection of its impenetrable Ægis. No stipulations of the pactional sort, which Virginia and Kentucky could have framed, would have afforded to the patent tenures of land in the district of Kentucky, that perfect and ample protection, which they at that time enjoyed, not only in public sentiment within the precincts of civilization, but under the constitution of the United States. On the other hand, the private rights and interests of lands, had no hope, could have no hope of protection from any source, other than that in which they found it, in compact. The 3d article, then, was most obviously framed with an eye to the weak and imperfect condition of that very numerous class of claims, which, without that sort of protection, must all have perished upon the unconditional erection of that district into a state. In that event, the laws upon which those rights depended, and by which they were to be effectuated, and the machinery necessary to their effectuation, would all have been gone. The surveyor, the register, and the executive, whose concurrent agency was necessary to their consummation in grant, would all have been wanting. Not so, it is repeated, of the patent tenures of land in that district. They needed no legislative aid or sanction from the new state; they were alike regardless of the favors and the frowns of the new government. When lands are patented, they are then the subject of the common law inferences ascribed to them by the opinion of the court; and upon the supposition that they were embraced within the provisions of the 3d article of the compact, under the denomination of rights, &c. would enjoy the sanctity ascribed to them, if indeed a stipulation to that effect could have validity. But a word more in relation to the import

of the words, rights and interests of lands, as used in the 3d article of the compact. They are employed by the legislature of Virginia in an act passed in the year 1781, in the manner following: "And when, &c. the surveyors of the counties on the eastern waters should survey, &c. all lands regularly *entered*, &c. by the end of the session of the assembly, and it not being in the power of the party *claiming such entry*, to compel the surveyor to perform his duty, &c. it is therefore unjust that he should lose his *rights*," &c. [1 Litt. 454–5.] What rights is it unjust that he should lose? His private right of the land which he had regularly entered. In what did his right consist? In the entry of land which he had thus regularly made; the entry which he could not compel the surveyor to survey. The act continues: "Be it therefore enacted, that the surveyors shall proceed, with all practicable dispatch, to survey the said entries before described, &c. &c. and the party *interested* shall be subject also to the same *forfeitures of right*, if he fail in any thing," &c. [1 Litt. 455.] Who was the party *interested*, and in what did his interest consist? The party was the owner of the entry, and his interest consisted in the entry. What was to be forfeited if he failed, &c.? His right. To what? To the entry of lands in which he was interested. The rights and interests of lands in Kentucky consisted in this class of cases in entry. Had those entries been surveyed, the rights and interests of the lands would have consisted in the surveys, and would have been liable to forfeiture, if the plats and certificates thereof had not been returned to the register's office, and the fees paid thereon, within the prescribed time.

The Virginia legislature passed an act in the same year, authorizing the county courts to make an order upon the surveyors of their respective counties, to lay off and survey for poor persons, of a certain description, a tract of vacant land, not to exceed 400 acres for each person; for which such person was to pay, within two and one half years, twenty shillings per 100 acres, in specie; and the following is the phraseology of so much of that act as relates to the non-payment thereof: "And in default of making such payment, all *right* and *interest* to such surveys shall be forfeited." [1 Litt. 431.] These were poor rights; and in this class, the right and interest consisted in the survey. In the two last recited acts, the words, *rights* and *interests*, are employed by the legislature of Virginia in the same *collocative* association in which they are used in relation to the same subjects, in the 3d article of the compact. In these, as in all the laws of Virginia under which claims could exist to lands in Kentucky, those words are used in the same sense—to designate the grades of inchoate rights, as they existed in warrant, in entry, and in survey; but never in relation to the land, as importing its identification with the technical or common law meaning of those words.

Then, we think, with great deference, that, in construing the 3d article of the compact, and particularly in searching for the meaning of the words, private rights and interests of lands, it could not have occurred to the court, that the very laws under which those rights and interests had arisen, and by which they had been created,

had defined them to mean any thing else than land, patented land; had defined them to mean every kind of right to land, except that by grant or patent; had defined them to mean the incipient, and all the advancing grades of right to land, but not the ultimate and consummate right by grant.

Having ascertained, from the laws under which alone the lands in Kentucky could be appropriated, that the words private rights, and interests of lands, did not mean the land itself, nor the rents, profits, and issues thereof, nor patents or grants therefor; that the fee simple title to at least five-sevenths of it was, at the date of the compact, in the commonwealth of Virginia, and passed from her to Kentucky upon its erection into a state, we proceed to inquire into the meaning of so much more of the 3d article as relates to the validity and security of those rights and interests which were derived from the laws of Virginia. The words are, "and shall remain *valid and secure* under the *laws* of the *proposed state*." What was to remain valid and secure? Not the lands; that would be an outrage upon all the proprieties of speech, a violation of the congruities. If the lands, by a figure of speech, were meant here by the words rights, &c. the figure would outrage the truth of the case, because five-sevenths of them had not been secured, were insecure; and the meaning could not be, that that which was *insecure* should *remain secure*, and that that which was *invalid* should *remain valid*. But the inaptitude of this exposition is more glaring when it is supposed that the lands should remain *secure* and *valid* to those private persons who had not secured them, and might never do so, under any circumstances, however auspicious.

It can with as little propriety be interpreted to mean the rents, profits, or issues of wilderness lands, in their forest state, unreduced to a cultivatible condition. What, then, it may be again asked, is the meaning of this clause of the stipulation? When we consider that the rights and interests of lands which were to remain valid and secure, were to remain so under the laws of the proposed state; that those rights were inchoate, and would require the legislative enactments of the proposed state for their effectuation; that they could not exist, after the sustaining energies of their parent code should be withdrawn, without the legislative protection and assistance of the proposed state; still less could they advance to their consummation in grant, without that protection and assistance; we become satisfied the meaning evidently is, that the proposed state obliged herself, by this stipulation, to furnish, by her enactments, the necessary facilities to the effectuation of those inchoate rights. Such enactments, on the part of the proposed state, were essential to their validity and security; for Virginia, after the erection of Kentucky, could do no act, by which their validity and security could have been promoted, or permanency thereto afforded.

Having ascertained, as we believe, the laws from which the rights and interests of lands in Kentucky were derived, and thereby ascertained the meaning which those words were employed, in the third article of the compact, to convey; and having ascertained the character of the laws of the proposed state, under which they were to remain

valid and secure, (that is, were to be protected and effectuated) it remains that we inquire into the third and last clause of that article: "And shall be *determined* according to the *laws now existing in this state.*"

Some difficulty, it is acknowledged, presents itself in disposing of this adverb "*now.*" Is it to be construed to mean the period at which the compact was made, which was the 18th day of Dec. 1789; or the period at which the district of Kentucky was erected into a state. According to either, or any meaning which the word will bear, in the connection it holds with the words with which it is here associated, there is much difficulty. That difficulty, however, is unimportant, as will be shewn hereafter, to the main object of this discussion.

If it be construed to import the time at which the compact was made, then its operation would be to destroy a very great proportion of those very rights of land which it was the object of that article of the compact to preserve secure and valid: for, at the date of that compact, the law under the authority of which alone locations of land could be surveyed, was about to expire, and, in that event, all the entries which had not been surveyed would be forfeited. And the law which authorized the Register of the Land Office to receive and record plats and certificates of survey, was then shortly about to expire; and, in that event, all the surveys which had not been returned to the land office would, together with the entries upon which they had been made, expire with it. (See 1 Litt. 460, 1.) Both these laws were continued by the Legislature of Virginia at its next session, in 1790; the first for two years, the second for nine months. The second was afterwards again continued by the Legislature of Virginia, at its session in the year 1791, for two years. But, if it should be construed to mean the time at which the compact was made, these subsequent enactments, prolonging the time, would, being in violation of its import, on that account be void, and the rights and interests of land which that article of the compact and these laws intended to preserve, would most inevitably be destroyed.

Nearly the same results present themselves, if the word *now* be constructed to mean *then*, viz: the first of June, 1792, when the new state went into existence; because the above enactments of the Virginia legislature, prolonging the time for surveying, and for returning plats and certificates of survey to the land office, expired in that year; and, although the state of Kentucky, by various successive enactments, prolonged the periods for both purposes; for that of surveying, for six years, and for that of returning plats and certificates of survey to the land office, for twenty years; yet those laws of prolongation were not *laws existing* in Virginia; nor were they existing laws, under either of the interpretations of the word *now*. It cannot be rejected; the canons of construction forbid its rejection. And yet, if it be retained, there seems to be great difficulty in preserving from forfeiture greatly the largest portion of the rights of lands in Kentucky, say two-thirds. Those forfeiting laws, just alluded to, having been enacted on the same subject, must be regarded and construed together with this article and the other statutes on the same subject.

They are in *pari materia*. In the process of construction, words may, and indeed often *must* be limited in their import, by the subject-matter in relation to which they are used. If we have been fortunate enough to satisfy the court, that the rights and interests of lands, which were to be taken care of under the provisions of this article of the compact, were derived, not from the common law of England, but from the *statute laws* of Virginia, in which they had originated, and by which they had been created; that they are so defined in those laws; that they must mean such inchoate rights as existed in warrant, entry, or survey of lands, and not in *grant;* that the enaction of laws by the proposed state, was necessary for their protection and effectuation, and that the provision in that article, that they should remain valid and secure under the laws of the proposed state, imposed upon the new state the obligation to enact such laws, may we not, in conformity with all the rules of just construction, interpret the words in the last clause of that article, "and shall be *determined according to the laws now existing in this state*," to impose an obligation upon the new state, to regard the special provisions of the statutes which created those rights, in determining upon them, when they should be called in question? By reference to those statutes, it will be found that those rights were subject to be searched, and their validity determined, in a proceeding upon *caveat*, in the trial of which, the court, according to the principles prescribed by those statutes, *searched* the heart and tried the reins of the conflicting claims. The common law furnished no mode of trying the validity of a warrant, an entry, or a survey, in the *unique* and *sui generis* character given to those rights, by the statutes from which they were derived. To regard, in determining upon those rights, the criterions of their validity furnished by the statutes which had created them; the principles of discrimination and preference, defined by those laws; and to regard those statutes as the rule of decision in whatever related to the nature or essence of the rights; taking this as the interpretation of this latter clause of that article, we can assign a rational, harmless, and operative import to the word *now*. The laws from which those rights and interests were derived, *had been enacted;* the laws under which they were to remain valid and secure, were *thereafter* to be enacted. The *laws*, those existing, and those to exist, are contrasted, in relation to their functions. The states are contrasted, in relation to the origin of those laws; the state of Virginia and the proposed state. The laws are contrasted as to time also. Thereafter, the proposed state should, from time to time, as occasion might require, enact laws for the effectuation of those rights; and thereafter, indefinitely, as cases might occur, should determine them, according to the laws from which they were derived, and under which they *now* exist, viz. at the date of the compact. Why, it may here be asked, should the word *laws*, as used in the last clause, be construed to mean a different character of laws from that meant by the use of the same word, in the two previous instances, in the same article, and in relation to the same subject matter, and by the same parties?

But we may, perhaps, derive some aid, at this point of our progress, from the 12th section of the great act of 1779, to which act we have already had occasion to refer. It is in the following words, viz. "And whereas, at the time of the late change of Government, many caveats against patents for lands, which have been *entered* in the council office, were depending and undetermined," &c. "Be it enacted, that all such caveats, with the papers relating thereto, shall be removed to the clerk's office of the general court, there to be proceeded on and *tried* in the *manner* directed by law for future caveats; but the same *shall be determined according to the laws in force at the time they were entered;* and, upon the termination of such caveat, a grant shall issue," &c. [See 1 Litt. 406.] This enactment was, there can be no doubt, the prototype or model upon which the last clause of the 3d article of the compact was framed. In this enactment, the state of Virginia, having just escaped from its colonial condition, prescribed to itself the same *rules of decision* which it exacted from Kentucky, upon its assuming the attitude in relation to Virginia, which that state had assumed in relation to its colonial condition. The rule is precisely the same in substance, in both cases. In each case it relates to the same class of subjects, viz: private rights and interests of lands. The words in the act just quoted, are: "And *shall be determined by the laws in force at the time they were entered.*" The words of the compact are: "And *shall be determined by the laws now existing in this state.*" Does the word *laws*, as used in the act, mean the common law of England and the British statutes made in aid of it? Certainly not; for those were the domestic laws of the colony, and had been *domesticated* by the state of Virginia. It would have been idle to have declared that those rights should be tried or determined by the laws in force at the time of their origination, if those very laws were all in force at the time of the declaration. We know that the common law was alike in force at both periods. The common law could not have been meant by the legislature. What laws then did they mean? The special statutes from which the rights *were derived*, under which the *entries* of the lands had been made. Those statutes either had gone, or were about to go out of force, and the state of Virginia constrained her judiciary to be governed by them, in determining upon the rights which originated under them.

The laws upon which the private rights and interests of lands in the district of Kentucky depended, would not be in force in the proposed state; not if that state should even adopt the common law of England. They were statute laws of Virginia; but, according to the clause of the 3d article of the compact, just quoted, the new state was bound, that those rights, so far as they might be involved in any judicial proceedings within her limits, should be determined according to the laws in force when those rights accrued; that is, the laws under, and by virtue of which, they did accrue. And this, Kentucky was bound to do, whatever might have been the shape of her judicial machinery, or the forms of proceedure. It is the essence of sovereignty, that it shall shape its own fashions, and fashion its own remedies.

Virginia, in the section just quoted, seems to have acted upon that conviction. The caveats were to be tried and proceeded in, in the manner directed by law for future caveats, but must be determined according to the laws in force when the entries were made.

Virginia could not reputably claim to exact of Kentucky, about to assume the attitude of a sovereign independent state, terms harder, or more severe, than she had prescribed to herself, upon her transit from a colonial to a state government; and what she could not, reputably to herself, have exacted, this court surely will not construe her to have exacted.

The rule which she prescribed to herself, in the section last above quoted, is in strict conformity to the law of nature and nations, and to what is understood to be the practice throughout the civilized world, in like cases. Why should a different rule have been demanded by Virginia, or assented to by Kentucky? Why should the word *laws*, in the Virginia rule, mean *only* the *statutes* of the colony under which the rights had accrued, and the same word, in the Kentucky rule, mean all the statute laws of Virginia, positive and remedial, the common law of England, the constitution and colonial charters, together with the decisions, usages, &c. of that state?

No good reason is perceived why the last clause of the 3d article of the compact should be construed to establish different principles, from those established by the use of the like words, in relation to the same kind of subject, and the like situation of parties, in the section above quoted.

So that it would seem that the *laws*, according to which the private rights and interests of lands in Kentucky were to be *determined*, pursuant to the last clause of the 3d article of the compact, were the statute laws of Virginia, which created, modified, and defined them; those statute laws in which their *validity* and *security* originated—the *very laws* from which they were *derived;* and that those rights were of that inchoate and imperfect character, which indicated their need of all the provisions of that article.

But, if the interpretation given above, of the words rights and interests of lands, should be thought to be too limited, and they should be construed to mean grants, as well as entries, surveys, &c. of lands, still it is evident, that the rights *only*, (of whatever kind they might be,) were solely the subject of stipulation; that it was not the intention of the parties to the compact, that the lands of the proposed state should *forever* be *exempt* from its legislation. This would seem to be evident, not only from the incompatibility of such a *state* of things, with the *existence* of the *sovereignty* of the proposed state, but because the common law afforded its inurements and its inferences only to the possessor of a legal title thereto, and there existed legal titles to but a very small proportion of the lands which had been entered. Five-sevenths, at least, of all the lands in that district, were at that time claimed under inchoate rights, the legal title to which was in the state of Virginia, and would pass to the state of Kentucky, under the 3d article of the compact, in trust for claimants of that descrip-

tion. If rights and interests were construed to mean lands, it could only be the lands for which grants had been obtained; and under that construction, the inchoate rights that most needed, and could not do without protection, would be left without it, and *needless* protection extended to grants; for no discrimination is made in the article. Besides, the lands could not be said to be derived from the laws of Virgina; but the rights to them were derived from those laws.

Again, it would be questionable, both as to the anglicity and sense of it, to say, that lands should be determined by the laws *now* existing, &c.; but it would be entirely proper so to speak in relation to the rights or title to the land. But the 4th article of the compact would seem to silence all doubt upon this point. By that, it would appear, that the parties, the moment they had closed the stipulations of the 3d article, in relation to the rights and *interests of* lands, passed, by a transition very easy and natural, from the *rights* of the land, to the *land* itself; and in that (4th) article stipulate, that the proposed state shall not *tax* the *lands* of non-residents higher than *those* of residents, &c. and that the lands of non-residents shall not be *forfeited* by the proposed state, for a failure to *cultivate* or *improve* them, until six years after the proposed state should have been admitted into the Federal Union. Now there was, at the date of the compact, no law of Virginia, which subjected lands to forfeiture, for a failure to improve or cultivate them. If, then, the stipulation of the 3d article, that private rights, &c. were to remain secure and valid, under the laws of the proposed state, embraced lands, they would have remained secure, and this provision of the 4th article was worse than idle. But, if the stipulations of the 3d article related not to the lands, but to the rights thereto only; and if, as seems to be admitted by the strongest implication, the state would have possessed the power, immediately upon going into existence, to *tax* and *forfeit* lands, then there was a motive for the restrictions, contained in the 4th article, upon that power. The provisions of that article are evidently *restrictive*, and presuppose the existence of a power, which they purport to restrain. But, again, if, according to the opinion of the court, not only the lands, but the rents, profits, and issues of them, whether natural or industrial, were secured by the provisions of the 3d article, from the legislative invasion of the proposed state, would it not have been an act of great stupidity in the parties, to frame and adopt the provisions of the 4th article? Would not that article have been, not only superfluous, but frivolous? And will the court, we beg leave to ask, most respectfully, persist in a construction, which fastens *fatuity* upon two States, and produces an irreconcileable conflict between the 3d and 4th articles of their deliberate compact?

But does not, it may be asked, the power to forfeit the lands for non-cultivation, include the power to inflict lighter penalties for that cause, and to subject the lands to their payment? And may not that penalty be inflicted in any mode which the sovereign may choose to adopt? And can it be said, that, to diminish the value of the land in the exaction of the penalty, is forbidden by that very compact, which

concedes by stipulation, the right to forfeit the whole? And does it lie in the mouth of any non-resident, who has not, during forty years, occupied, cultivated, or improved his lands in Kentucky, to say that the state has done him wrong, in subjecting his lands to the payment of the price of the labor innocently and honestly exerted in improving them, when it had the acknowledged right of forfeiting the lands entirely, because of his failure to cultivate and improve them? When the price of that labor exceeds the value of the land, in its unimproved state, then the operation of the law will have been, that he has lost his lands by his own fault; a fault for which it is acknowledged they might have been directly forfeited: and it is not competent for him to dictate to the state in what manner it shall exercise its forfeiting power, or what disposition it shall make of the lands, which it shall choose in any way to forfeit. So that, in the worst aspect of the occupying claimant laws of Kentucky, (and the portraiture of them, given in the opinion of the court, is certainly not very flattering,) their operation amounts to no more than the exertion of an acknowledged power. (the power of forfeiting) would produce. And the operation of the law is not upon his right to the land, whatever that may be; it is upon the land itself. And then the shape of the question is not, whether those laws will permit, or oblige a man to buy *his own* lands, but whether a man, who has stood by in silence, beholding the innocent occupant wearing out his life in improving the lands, for which he also had honestly paid, shall come in, assert claim to the land, and, by the *common law* magic, of an anterior date to his parchment, unhouse the occupant, and enjoy the fruits of the labor of his life, without paying therefor any equivalent whatever?

No state that possessed the power of legislation over its soil, could or ought to submit long, to tenures of it, unassociated with cultivation. The desolating effects of the numerous tenures of that sort in Kentucky, have greatly retarded its agricultural advancement, and would, but for the benign effect of its occupying claimant laws, have thrown it behind its just destinies at least twenty years. That state could not have got along at all without them. They present to delinquent claimants the mildest, the most mitigated aspect of the exertion of the forfeiting power; and no shape of that power, in relation to the lands of non-resident claimants, who have failed to improve the same, is believed to be impactional.

The power to make laws, the power to legislate, is of the essence of sovereignty. It enters essentially into every just definition of sovereign power; because its exercise is indispensably necessary to the associated condition of man. Its necessity results alike from his selfish and social nature. His intimate connexion with, and dependence upon the soil, not only for subsistence, but for the just enjoyment of his social and selfish propensities, brings the soil necessarily under legislative subjection. Hence, it would seem to follow, that Kentucky could not become a sovereign state, without possessing legislative power over the soil within her limits; and if she was to become a state, she had a right, under the constitution of the United States,

to become a sovereign and independent state, at least so far as that sovereignty and independence could exist, compatibly with that of the United States, as delineated in its constitution. She had a right to that exemption from dependence upon any of the other states, which each of them possessed in relation to the others. This, it is presumed, is what is denominated the independence of the states of the American confederation. She had a right to exercise sovereign power to the same extent in which each of the other states might exercise it; and it was not competent for Virginia to withhold that power from her, in the process of her erection into a state, more than it would have been competent for her to reclaim it by compact, after she had become a state. To maintain equilibrial powers between the states, is presumed to have been among the leading reasons which produced the adoption of that provision in the constitution of the United States, which restrains the states from entering into compacts with each other, and with foreign powers. Instead of giving Virginia a power, by construction, to legislate for the soil of Kentucky, or giving her the power of not doing it; (if that phrase may be so applied,) and restraining Kentucky from doing it, it is respectfully contended, that an explicit compact to that effect must have been void, from its intrinsic unfitness. For, it is contended, that the power of promoting industry, by securing to its votaries the enjoyment of its fruits, is inherent in sovereignty, and no state can prosper, or even get along, without exercising it. It is not very important who cultivates the soil, A or B; but it is vitally important that the soil should be cultivated. The strongest incentive to the cultivation of the soil, is to be found in conscious proprietorship—in stability of tenure; and Government must, by its laws, give to occupancy that repose, which will inspirit labor, awaken enterprise, and diffuse contentment. This power to legislate over the soil is essential to that distribution of it which is most favorable, not only to the comfort, but to the freedom of those who cultivate it. Suppose the doctrine of primogeniture and entails had existed in Virginia at the date of the compact, and that Virginia had, since the erection of Kentucky into a state, abolished those laws; according to the construction given to the third article of the compact, Kentucky must, notwithstanding, continue forever to submit to the pernicious tendency of those laws.

A state must have the power to provide, by its laws, for the distribution and descent of real property; to regulate the tenures, transfers, and testamentary dispositions of it; to protect the occupancy, and encourage the cultivation of it; in short, to suit its legislation over it to the ever varying condition of those who constitute the state; for states have their vicissitudes, though not in regular, yet often in rapid succession. Hence, the provision in all, or in almost all the American governments, for the annual session of their legislatures. But the annual session of the Kentucky legislature will turn out an expensive illusion, if the construction given to the 3d article of the compact is to be the criterion of its power. If that is the *sound*, and is to be the *permanent* construction of that article, permit us to ask, most respect-

fully, if the fact will not turn out to be, that Virginia has smuggled Kentucky into the Union, in the character of an independent state, while, in *reality*, she retained her as a *colony?* For that power that cannot legislate in relation to the soil which it occupies, must be the vassal of the power that gives law to the soil. And what is the difference between giving at once to a country, the law which shall regulate the tenure and occupancy of its soil in all time to come, and legislating for it as occasion may require, *through* all time to come. In either case, the legislating power is the sovereign, and the people who occupy the soil which is the subject of legislation, must be vassal; and of the two modes of receiving law, that would be best received which was successive, suitable, and seasonable. Still, in either case, it cannot be disguised, that they are not free; that they are vassals.

If, in the compact between Virginia and Kentucky, there had been a stipulation, that all personal rights, and rights of personal property, should remain valid and secure under the laws of the proposed state, and be determined by the laws then existing in Virginia, could Kentucky, (we beg leave to ask,) have gone into existence as an independent state, under such additional restrictions upon her legislative faculties? Or could she, without a total perversion of terms, have been denominated a state at all? And why might not such a stipulation have been inserted in the compact? Not, certainly, because the 3d article, as it now stands, imports all of restriction, that could have been sustained by Kentucky, compatibly with her existence as a sovereign state; and still more certainly, not because of any unwillingness in Kentucky to make the concession; for, if she was willing to surrender to Virginia the sovereignty of the soil, (and that is the construction given to the import of the 3d article of the compact,) she could have no motive to retain the faculty of legislation as to personalties and personal rights: for it is an axiom in politics, that those who control the soil, control with it those who occupy it; and the retention of the latter, upon the supposition that the former had been surrendered, would have been expensive in its exercise, and unavailing in its effect.

As this compact purports to be a contract between two sovereign states, we are constrained, in construing it, to regard those principles of acknowledged political orthodoxy, by which the just *powers* of states are ascertained and defined; those powers which enter into the essence of sovereignty, and are essential to the enjoyment of freedom. Those principles have, therefore, been referred to with the same freedom, that reference is made to the established rules of law, in the exposition of ordinary contracts. Their application to cases of this description, is believed to be as appropriate, as the application of the rules of the municipal law to ordinary contracts.

But let us look at some of the practical results of the construction given in the opinion, to the 3d article of the compact; for if it must produce results to which the parties cannot be supposed to have assented, at the time they formed it, the construction cannot be correct; because its correctness can only consist in its *consonance* with the *intention* of the parties.

The great principle established in the opinion, is, that any law of Kentucky which renders lands in that state, which were derived from the laws of Virginia, less valuable or less secure, in relation to the rents, profits, and issues, thereof, is impactional, and of course null and void. Now, three-fourths of the lands in Kentucky were appropriated, at least three times over, under the laws of Virginia.

Lands in Virginia could not, under the laws existing in that state at the date of the compact, be sold, under execution, for the payments of debts. Lands have always, under the laws of Kentucky, been subjected to sale, under execution, for the payment of the debts of their proprietors. The private *rights* and *interests* of such lands as have been thus sold for the payment of debts, cannot, according to the opinion of the court, have remained as *valid* and *secure* under the laws of Kentucky, as they were under the laws of Virginia, at the date of the compact; and therefore, under the opinion, those laws of Kentucky were void, and the sales made under their authority were invalid, and conferred no title upon the purchaser, and, of course, are subject to reclamation by the original owners and their heirs.

At the date of the compact, the crime of horse stealing was punished, under the laws of Virginia, with death. The state of Kentucky, very soon after it believed it possessed the power to do so, mitigated the rigor of the Virginia code in that instance, among many others, and commuted confinement in the jail and penitentiary house for capital punishment, whereby culprits of that description became entitled, under the constitution of that state, to be bailed. The recognizance, under a law of Kentucky to that effect, contained the condition, that, if the culprit should fail to appear and answer to the charge, the penal amount thereof should be levied of his lands, &c. Here, also, it may be said, that the lands of the culprit and of his securities, are rendered less secure than they would have been under the Virginia code.

The state of Kentucky has, it is believed, in some cases of a penal character, which were punishable under the laws of Virginia, at the date of the compact, with stripes or imprisonment, substituted for the punishment inflicted by those laws on the body of the culprit, an exaction upon his purse, and subjected *his lands* to the payment of the penalty. Here, also, it may be said, that the rights and interests of the lands of the offender are rendered less secure than they were under the Virginia code, and that the law, producing that effect, is impactional and void.

It is the settled sentiment of the statesmen and jurists of Virginia, that lands in that state, and the rights thereof, are greatly more secure under the restricted exercise of the elective franchise, which prevailed, at the date of the compact, in that state, than they would be if unqualified suffrage were permitted. Upon this principle, so much of the constitution of Kentucky as proclaims to its citizens the unqualified right of suffrage, may be declared void, because the rights of land are thereby rendered less secure than they were at the date of the compact.

It may be said, that the principle settled in the opinion was not intended to apply to the laws above enumerated. May it not, we ask, most respectfully, whatever may have been the intention of the court, be extended and applied to those laws; and must they not, (in the maintenance of consistency) whenever they are drawn in question, be declared to be void, and all proceedings had under them, to be invalid? If such was not the intention of the court, is not that circumstance an additional reason for the reconsideration of the opinion?

The principle settled in the opinion would seem not only to extend to, and embrace the laws of Kentucky, to which reference has been made, but to bestow a *squint* of fearful *presage* upon the remedial laws enacted by that state in relation to the realty, or to real actions. For, says the opinion, "the objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the *extent* of the *change the law effects in it;* any deviation from its *terms,* by *postponing* or *accelerating* the period of performance which it prescribes, imposing conditions not prescribed in the contract, or dispensing with the performance of those which are, *however minute* or *apparently immaterial* in their *effect* upon the contract of the parties, *impairs* its obligation."

May we not be permitted to ask, if this is not holding a very tight rein over the exercise of sovereign power by a state? Can it be supposed, that a state would consent to possess, and to exercise sovereign power, under the requisition of such precision and exactness—under such a curb?

Can the state of Kentucky enact any laws in relation to the lands within its limits? Or, must the laws which existed in Virginia, at the date of the compact, in relation to those lands; to the rights and interests thereof; to the remedies for the violation of those rights and interests, forever remain the criterion of rights and remedies in relation to the realty, in the state of Kentucky? And must any laws which the legislature of that state may enact in relation thereto, depend, for their validity, upon *their exact* and *precise* conformity to the Virginia laws upon the same subject? Does not the opinion answer, emphatically, *yes;* and declare that any deviation therefrom, however *minute,* and *apparently immaterial in its effect,* must be fatal to the laws; and that those laws, in relation to lands, which were in force in Virginia at the date of the compact, were embraced by it, form an essential part of it, and must be conformed to by Kentucky, in all its enactments concerning lands? But let us consult the words of the opinion farther upon this subject. It says, "*if the remedy be qualified and restrained by conditions of any kind,* the right of the owner may indeed subsist, and be acknowledged; but *it is impaired and rendered insecure, according to the nature and extent of the restrictions.*" What is the import of this quotation from the opinion, but, in effect, a repeal by anticipation of the remedial laws of Kentucky, to the extent in which they differ from the remedial laws in force in Virginia at the date of the compact, in relation to real actions? And so far as they *conform exactly* to those laws, it was certainly idle to enact them. The limitation laws of that state must, under the opinion of the court, fall with

its occupying claimant laws. Kentucky cannot, by the exertion of any sovereign power she possesses, or rather she does not possess the power, to prescribe, by the enaction of laws, a limit to those controversies for the soil within her jurisdiction, wherewith she has been heretofore greatly afflicted, and with which her best prospects, in time to come, are much darkened. In short, do not all the parts of that opinion converge in the establishment of the sentiment that the code of Virginia, that code which was in force in that state on the 18th day of December, 1789, must be, and continue to be, in all time to come, the code of Kentucky, in relation not only to the lands within her limits, and the rights thereto, of whatever kind, but in relation to the *remedies* also? And we are willing to admit that all these doctrines flow naturally enough from the premises laid down by the court. But, when it is considered that those premises were obtained by construction; that, in ariving at them, Kentucky will have to be considered as having been so eager for a *quasi state posture*, as to have agreed to renounce *forever* (for permission to occupy that attitude) the great and essential attributes of state sovereignty; to renounce, *forever*, all jurisdiction over the territory and soil within her limits, and to have agreed that the relation of her citizens to the soil upon which they were to subsist, should be *forever* regulated by an *alien* code, which could neither be varied nor improved by the *charities* of the power that framed it, nor by the necessities of the one that adopted it, and which might, indeed, be renounced by the former, upon a conviction of its inadequacy to its original purposes, and to the varied, advanced, and advancing condition of the society for whose benefit it was originally framed and adopted, but which must nevertheless *forever* remain obligatory upon the people of Kentucky; that is, that the stream must still continue to flow, after its *source* has *dried up*. Even the poet's "*Labitur et semper labetur, per omne volubile ævum*," was predicated upon the unfailing sources of the stream. It is respectfully repeated, that, when the court again reflects upon the premises which they have obtained by the construction which they have given to the 3d article of the compact, and upon the conclusions to which those premises lead; they will (it is ardently hoped) pause and inquire of themselves, whether those conclusions are in conformity with the nature of the subject matter of that compact, and with the condition and *intention* of the parties who framed it?

And after all, what is this thing, called construction, more than to *supply* by *presumption* the absence of a clearly expressed intention by the parties, (say) to a contract? And how can what the parties meant, be presumed, unless the condition of the parties, and the subject-matter of the contract be known? And when that is known, how is presumption employed? Why, simply in inferring that *sentiment*, or state of *will*, which reasonable men in all respects similarly situated, under the influence of the sleepless vigilance of self-love, would have formed or entertained. The sentiment, or state of will, to which this process leads, has the stamp of intrinsic fitness upon it; a fitness that maintains its character, whether viewed in relation to consequences

or causes. It fits alike, the presumed motive of the parties to the contract, the subject-matter of the contract, and the results flowing from the contract.

Can it be supposed or presumed, reasonably, that the district of Kentucky, engaged, at the date of the compact, in its tenth years' war with the savages that occupied the wilderness on its southern, western, and northern frontier, itself almost a wilderness; a war which had not intermitted during all that time, and had been unusually sanguinary; with its settlements sparse and scattered, weak, from the paucity and dispersed state of its population, not knowing certainly when the war would terminate, or with what further ravages its progress might be marked; situated from three to five hundred miles from any efficient source of assistance, constrained to rely upon its own strength and resources, its territory encumbered and cursed with a triple layer of adversary claims: Can it be supposed, that a district thus situated, conscious that it needed the strength of increased population, not only to sustain it in the war in which it was engaged, but to reduce its wilderness land to a state of cultivation, and thereby furnish the resources necessary to sustain the new government, would, in the very process of its formation, surrender the power, so indispensably necessary, if not to its very existence, certainly to its well-being and prosperity? It needed the power to furnish incentives to emigration and to industry; to silence, as speedily as it could be justly done, the litigation in relation to its lands, which threatened its repose. Can it be presumed, it is again asked, to have consented to part with those powers, which, if they were not essential to its sovereignty, were indispensably so to its condition?

It remained, when the Indians should have been conquered, to subdue the forests of the wilderness. Can it be reasonably supposed, that the people of that district, after winning the country by conquest, under circumstances of privation, hardship, and gloom, of which a *true narrative* would, on account of their peculiarity, seem more like romance than history—a gloom not indeed uninterrupted, but, when interrupted, brightened only by the gleams of their own chivalric, daring, and valorous achievement; that such a people would consent to clear up grounds, erect houses, build barns, plant orchards, and make meadows, for the sole convenience of those who had *latent rights*, and who, during the war, and while the improvements were making, had remained as *latent* as their *rights?*

The conduct of the state of Kentucky, whatever may have been said of it by the *misguided* or the *unprincipled*, has been high-minded, liberal, and indulgent, towards non-resident claimants of lands in that state. She indulged them from year to year, for six years, to make their surveys, and from year to year, for twenty years, to return plats and certificates of survey to the register's office. She repealed her laws against champerty, so early as the year 1798, in the mistaken view of furnishing to them increased facilities of disposing of their claims; and, in all her laws for the appropriation of vacant lands, she declared that every survey or patent which might be obtained under

those laws, should be absolutely void, so far as it should interfere with a survey made in virtue of a right derived from Virginia.

She knew the extent of the obligation imposed on her by the compact, and she most scrupulously avoided impairing it; and, as evidence of her good faith in this matter, the state of Virginia has never complained; the *parties* to the compact gave it the same interpretation. So late as the year 1822, the 3d article of the compact received, in the report of a very enlightened committee of that state, in relation to the claims of its officers and soldiers to bounty lands in Kentucky, an exposition different from that given in the opinion, and in accordance, in the main, with that herein urged. The court are respectfully referred to that report, which, though it is not believed to be correct in every particular, is certainly a very able performance, and exhibits, in relation to its object, a masterly view of the subject. The power of Kentucky to enact limitation laws, is very clearly and expressly admitted in that report. May it not, then, be hoped, that the court will reconsider their opinion, and adopt that construction of the compact which speaks peace to the family altars and firesides of half a million of souls, under which alone the people of the state of Kentucky *can live* and continue to be as happy as their industry and virtue shall entitle them to be; and as free as, in the character of citizens of an independent and sovereign state, they have a right to be?

Nor are the undersigned without the hope, that the court will find, in the circumstance that the opinion was formed by three only of the seven judges, an additional motive to review the case. The cause which subjected a case involving principles so vitally interesting to the state of Kentucky, to a decision by a minority of the judges, is greatly to be regretted, and furnishes, it is respectfully suggested, in the opinion of the undersigned, a strong reason for reiterated deliberation. Besides, when the court reflects that the case in which the opinion has been pronounced, was a case substantially, though perhaps not formally settled, they will be convinced that no injury can result from the delay which a reconsideration may produce. Of the four judges who were on the bench when the opinion was given, one dissented. Had one of the three, instead of concurring therein, concurred with the dissentient judge, the posture of things in Kentucky would not have been disturbed. So that, in effect, the rights of half a million of people are to be afflictingly changed and controlled by the opinion of *one single individual* member of the court.

All which is most respectfully submitted, by

JOHN ROWAN.
HENRY CLAY.